United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/945
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 945

Case No. 1069: BALDWIN

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas, on 5 February 1999, George Leonard Geoffrey Baldwin, the recipient of a retirement benefit paid by the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF or the Fund) filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 February 1999, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

"II. PLEAS

(a) (i) The Tribunal is requested to order the United Nations Joint Staff [Pension] Board to provide me with the actuarial assessment of the equivalent lump sum of my prospective widow's benefit, as requested of the Secretary in my letter of 31 January 1997 (...), effective at the date of my separation from service, 1 October 1996.

ii) The Tribunal is requested to order the United Nations Joint Staff Board to provide me with a copy of the minutes of the meeting in Vienna, on 14 July 1998, at which the Standing Committee rejected my appeal against the

Secretary's decision that I was not entitled to the option of commuting my prospective widow's benefit into a lump sum.

(b) The Tribunal is requested to rescind the decision of the Standing Committee of the [United Nations] Joint Staff Pension Board that I am not entitled to the option of commuting my prospective widow's benefit into its full actuarial equivalent. ...

(c) (i) If the Board has not complied with (a) (i) above, the Tribunal is requested to order the Board to provide me with the assessment of the full actuarial equivalent of my prospective widow's benefit, so that I may decide in conjunction with my wife whether to exercise the option to commute it.

(ii) The Tribunal is requested to order the United Nations Joint Staff [Pension] Board to pay interest from 1 October 1996 in the event that we choose to commute the prospective widow's benefit.

(d) Should the Secretary-General decide to pay compensation instead of the option to commute the widow's benefit, I claim such sum as the Tribunal may determine as being reasonable in the circumstances.

(e) No other relief appears relevant."

Whereas the Respondent filed his answer on 20 May 1999;

Whereas the Applicant filed written observations on 6 June 1999;

Whereas the Applicant submitted an additional document on 12 May 2000;

Whereas the facts in the case are as follows:

The Applicant was a participant in the UNJSPF from 28 September 1987 until his separation from service, on 1 October 1996. At the time of his separation, he was legally married.

On 18 October 1996, the Applicant was given estimates of his benefit options: a full retirement benefit or a reduced benefit and a lump sum not exceeding the actuarial equivalent of one third of the benefit. On 31 January 1997, the Applicant wrote to the Secretary, UNJSPF, and suggested a third option: a full pension under article 28 (g) of the Regulations of the UNJSPF plus "widow's benefit commuted for a lump sum [under articles 28 (g) and 34 (b)]". The

Secretary, UNJSPF, advised the Applicant on 10 February 1997 that the third option was not available to him.

On 17 March 1997, the Applicant wrote to the Secretary, UNJSPF, stating that his reading of the Regulations indicated that he had the option "of commuting the prospective widow's benefit for a lump sum without losing entitlement to the full retirement benefit". He also asked that he be given the "actuarial equivalent of the widow's benefit". The Secretary, UNJSPF, replied on 21 March 1997 advising the Applicant that, in accordance with article 28 (g) (iii), that option was not available to him since the standard annual rate of his benefit was not less than US$300.

On 24 March 1997, the Applicant wrote again to the Secretary, UNJSPF, stating that article 28 (g) (iii) was irrelevant to his case, especially in light of the provisions of article 34 (b). On 11 April 1997, the Secretary, UNJSPF, advised the Applicant that "the *only* reference under article 28 of the Fund's Regulations to commutation of a prospective spouse's benefit [was] that contained in subparagraph (g) (iii), and that "under the Fund's Regulations there is no general right to commute prospective spouse's benefits". He referred the Applicant to Section K of the Administrative Rules of the UNJSPF, in case he wished to request a review by the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB). In his reply of 14 April 1997, the Applicant indicated that he wished to appeal the decision of the Secretary, UNJSPF, to the "Staff Pensions Committee" and asked for advice how to proceed, and again requested to be provided with the "actuarial value of the widow's benefit".

In his reply of 28 April 1997, the Secretary, UNJSPF, again advised the Applicant to follow the procedure for reviews and appeals outlined in Section K of the Fund's Administrative Rules. Stating that there was no legal basis for the Applicant's request, he refused to authorize the expense of obtaining a hypothetical calculation of the "current actuarial value of [his] wife's potential UNJSPF survivor's benefit".

On 14 June 1997, the Applicant appealed to the Standing Committee.

On 14 July 1997, the Secretary, UNJSPF, informed the Applicant that the Standing Committee had not been able to consider his request for review at its meeting from 30 June-2 July 1997, and that the request for review would be taken up at the next meeting of the Standing Committee.

On 14 August 1998, the Secretary, UNJSPF, informed the Applicant that the Standing Committee had considered his request for review on 14 July 1998 and that it had decided unanimously to "uphold on the merits the Secretary's decision ... based on the clear text of the relevant provisions in the UNJSP Fund's Regulations". The letter was resent on 21 December 1998, following the Applicant's complaint that he had not received the 14 August communication.

On 27 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

Under articles 28 and 34 of Regulations and Rules of the UNJSPF, the Applicant has the right to commute his widow's prospective benefit at the standard annual rate of half the retirement benefit. Under article 28 (g) the use of the indefinite article "A" before "benefit" means that any benefit may be commuted, provided it is paid at a standard annual rate. Thus, payment of the widow's prospective benefit is not restricted to benefits payable at a rate of less than US$300, as mentioned in paragraph 28 (g) (iii).

Whereas the Respondent's principal contentions are:

1. The only reference in the Fund's Regulations to commutation of a surviving spouse's benefit is in article 28 (g) (iii), and only in respect of annual benefits of less than US$300, the possibility is accorded of commuting a spousal benefit.

2. There is no general right to commute a spouse's benefit. The reference in article 34 to commuting a spouse's benefit must be read as referring to article 28 (g) (iii), since there are no other references to this possibility in the Fund's Regulations. This interpretation is confirmed in the drafting history of the current provisions (see Report of the UNJSPB to the General Assembly, 10th session (A/2914), Annex II, 1955).

The Tribunal, having deliberated from 5 to 28 July 2000, now pronounces the following judgement:

I. The Applicant requests the Tribunal to order the UNJSPB to provide him with certain documents and to rescind a decision of the Standing Committee of that Board denying him the option of commuting his prospective widow's benefit into a lump sum. As an alternative to the second request, the Applicant asks the Tribunal to order the Board to provide him with a calculation of the full actuarial equivalent of his prospective widow's benefit and to pay interest on that benefit, if it is eventually commuted. Finally, the Applicant claims a reasonable sum, if the Respondent compensates him in lieu of allowing the Applicant the option of commuting his prospective widow's benefit.

II. The response of the Tribunal to these requests is governed by the Regulations and Rules of the UNJSPF, which cannot be reasonably interpreted to support the contention of the Applicant that he may commute his prospective widow's benefit. This conclusion leads to the denial of each of the requests by the Applicant.

III. Article 28 (a) of the Regulations provides a retirement benefit to a participant who meets certain qualifications not at issue here. The benefit is paid at a standard annual rate, based on years of contributory service multiplied by a percentage of final average remuneration. A retirement benefit may be commuted into a lump sum payment by a participant under the conditions stated in article 28 (g). That paragraph begins with the language that a "benefit payable at the standard annual rate may be commuted by the participant into a lump sum *subject to the following limitations* ...." (emphasis added). The limitations link the lump sum payable to the amount of the standard annual rate. The Applicant, whose retirement benefit would be payable at the standard annual rate of US$300 or more, falls under paragraph (g) (i). Paragraph (g) (i) establishes a minimum amount for any lump sum payment in this higher category.

IV. The claims of the Applicant require the Tribunal to consider also Article 34, relating to "Widow's benefit". Subject to certain conditions, which we need not consider, a widow's benefit is payable to the surviving female spouse of a participant provided the union continued until the death of the participant and provided the participant had not commuted his prospective widow's benefit under article 28 or 29 (relating to early retirement benefit).

V. This returns the analyses to article 28, which is the article that applies here. Paragraph 28 (g) (iii) – one of the limitations mentioned in the introductory language of article 28 – concerns small pensions. It applies when the standard annual rate "is less than 300 dollars". In that event the benefit may be commuted into a single lump sum to the extent of its full actuarial value. In addition "if a participant is married, the prospective benefit payable to his spouse may also be commuted at the standard annual rate of such benefit."

VI. The Applicant asks us to read this limitation into article 28 (a). The Tribunal is mindful that, in accordance with its rules of interpretation, the language of a regulation must be read in its "entirety and in context". (Cf. Judgement No. 656, *Kremer and Gordon* (1994)). Given the language and the context of articles 28 and 34, to accept the interpretation of the Applicant would strain the logic of article 28. It also would render article 28 (g) (iii) meaningless, since there would be no need to mention the commutation of a widow's benefit under article 28 (g) (iii) if it were already provided for under article 28 (a).

VII. Moreover, the Tribunal finds that its interpretation coincides with the Fund's explanation to the General Assembly of its recommendations for amendment of the Regulations of the UNJSPF in 1955. That explanation notes that what is now the second phrase in article 28 (g) (iii) was

> "proposed for administrative reasons to avoid, as far as possible, the payment of pensions of very small annual amounts to widows. This is particularly desirable where the staff member himself has taken his benefit in the form of a capital payment and the title to widows' [sic] benefit, unless it is cancelled by payment of a lump sum, may arise at some much later date after contact with the fund has been lost." (A/2914), Annex II, 1955)

VIII. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/946
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 946

Case No. 1040: HAZOU

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Tuma Hazou, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 August and 30 September 1998 the time limit for the filing of an application with the Tribunal;

Whereas, on 14 September 1998, the Applicant filed an application containing pleas which read as follows:

"**II. Pleas**

7. With respect to.... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and Chapter IV of its Rules;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in failing to make a finding of prejudice in the Applicant's case taking into consideration all the evidence before it;

(b) *To find and rule* that the compensation awarded by the Respondent for the procedural irregularities in his case was inadequate in view of the seriousness of the wrongdoing and damage to the Applicant's legitimate career expectations;

(c) *To award* the Applicant full salary and allowances including pension entitlements equivalent to his reinstatement through 31 January 2000, the month in which the Applicant reaches normal retirement age;

(d) *To award* the Applicant additional appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof, including evidence of discriminatory motivation and for the delays in payment of the compensation previously awarded;

(e) *To fix*, pursuant to article 9, paragraph 1 of the Statute and Rules, if applicable, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(f) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 14 February 2000;

Whereas the Applicant filed written observations on 11 May 2000;

Whereas the Applicant submitted an additional document on 9 June 2000;

Whereas, on 19 July 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 1 May 1990, as Chief, External Relations at the P-5, step-VI level, in the Middle East and North Africa (MENA) Section, Amman, Jordan, on a two-year fixed-term contract. His appointment was renewed for a two-

year period, until 30 April 1994. His appointment was extended several more times, the last one expiring on 31 October 1996.

On 28 January 1994, a UNICEF Personnel Officer in New York sent a telex to the Regional Director, MENA, which stated that, since the Applicant would have served four years on fixed term appointments by 30 April 1994, "he [would] be eligible for review by the APC [Appointment and Promotion Committee] for conversion to a permanent appointment effective 1 May 1994". The Personnel Officer requested that the Regional Director submit her recommendation in that regard, together with the Applicant's 1993 performance evaluation report (PER) by the end of February 1994.

On 28 April 1994, the Regional Director sent a memorandum to the UNICEF Personnel Officer, recommending that the Applicant's contract be extended for one year "to enable sufficient time for a determination of options ... and to allow for improvements in performance ..."

On 5 January 1995, the UNICEF Personnel Officer informed the Applicant that his fixed-term appointment was being extended administratively until 30 April 1995. She notified the Applicant that submission of his case to the APC was delayed pending finalization of his 1993 PER which was received only on 27 October 1994. She further informed him that the Regional Director was now being requested to submit her recommendation for the Applicant's conversion to a permanent appointment "effective 1 May 1995".

On 23 February 1995, the Applicant wrote to the Regional Director, regarding the delay in presentation of his case to the APC. He stated that he had been working without a contract for more than 10 months, which was "demoralizing and un-settling", and that he was unwilling to sign a contract "which [was] almost a year overdue". He requested that she recommend him for permanent employment.

On 16 March 1995, the Applicant sent a memorandum to a UNICEF Personnel Officer, informing her that he had completed and handed in for dispatch Part 6 of his PER for the period 1 November 1993-9 March 1995, which had been sent to her by his supervisor incomplete and without having been discussed with him. On the same date, Part 6 of the Applicant's PER was sent to the UNICEF Personnel Officer. In Part 5 of the PER, the Regional Director, as the First Reporting Officer, commented that he was able to do well tasks he had done previously but

found it difficult to move into new areas and that he needed to take more initiative, be more creative and take a leadership role in the office. The Second Reporting Officer noted in Part 7 that he did not know the Applicant well enough to make an assessment, but recommended that the Applicant " be given another chance under close direct supervision ..."

On 16 May 1995, the Applicant wrote to Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, submitting a rebuttal of the PER. He stated, *inter alia*, that his Supervisor had gone out of her way "to undermine [his] character and professional competence". On 22 June 1995, the Regional Director submitted her comments in reply to the rebuttal to the UNICEF Personnel Officer. She was "shocked and appalled" that the Applicant had made a "personal attack" which was "defamatory, insulting and contain[ed] falsehoods". According to the Regional Director, the PER was prepared with no prejudice, based solely on performance and keeping in mind the interests of the Organization and "... with much thought and after in-depth study of previous PERs". On 3 July 1995, the Applicant wrote again to Ms. Sham Poo, Deputy Executive Director, refuting the comments submitted by the Regional Director.

On 2 August 1995, the APC recommended conversion of the Applicant's contract to permanent status contrary to the recommendations of the MENA Regional Office. On 13 December 1995, the APC met again, reconsidered the case and recommended that the Applicant's contract not be renewed beyond 31 October 1996.

On 7 March 1996, the Applicant wrote to the Executive Director, UNICEF, bringing his case to her attention. Stating that he had been informed only one week earlier of her decision to accept the APC's recommendation not to renew his fixed-term contract, he insisted that his case was one of "gross mismanagement", a violation of due process and a serious infringement of his rights. He requested the Executive Director to review the matter.

On 15 March 1996, the Officer-in-Charge, Division of Human Resources, UNICEF, advised the Applicant of the APC's recommendation that his contract not be renewed beyond 31 October 1996, and that the recommendation had been accepted by the Executive Director. She also advised him that he would be placed on special leave with full pay for the remainder of his contract.

On 11 April 1996, the Ombudsperson for the MENA region contacted the Executive Director, UNICEF, and appealed to her to review the Applicant's case.

On 16 May 1996, the Applicant wrote to the Secretary-General, requesting review of the decision not to grant him a permanent appointment or renew his contract.

On 20 May 1996, the UNICEF Ombudsperson for the MENA Regional Office, wrote to the Regional Director, MENA. He concluded that there were "reasons to suspect non-observance of due process" in the Applicant's case and recommended that it should be reviewed.

On 24 June 1996, the Applicant requested that the Joint Appeals Board (JAB) recommend suspension of action on the contested decision.

On 23 September 1996, Ms. Sham Poo responded to the Applicant's request for review, confirming that the decision stood. On the same date, the Applicant lodged an appeal with the JAB.

On 14 October 1996, the JAB issued its report on the Applicant's request for suspension of action. It unanimously recommended that the request be granted.

The Under-Secretary-General for Administration and Management informed the Applicant on 28 October 1996, that the Secretary-General was not in agreement with the JAB and had decided not to grant the Applicant's request for suspension of action.

The Applicant separated from service on 31 October 1996, upon the expiration of his contract.

On 25 November 1997, the JAB submitted its report on the Applicant's appeal against the decision not to grant him a permanent appointment or to renew his fixed-term contract. Its considerations, conclusions and recommendation read, in part, as follows:

"*Considerations*

...

18. The Panel was aware that, in accordance with the applicable Tribunal judgements, the burden of proof in an accusation of prejudice lies on the Appellant. It noted a number of indications that prejudice did exist:

- The doubts expressed in the APC meeting of 2 August 1995 'as to the objectivity of the Regional Office ...'

- The dilatory fashion with which [the Regional Director] dealt with [the] Appellant's performance assessments, despite pointed reminders from

Headquarters, and her decision to send her assessment of March 1995 to Headquarters without giving Appellant the opportunity to see or rebut it.

- The report of the Regional Ombudsman and the Administration's failure to act on them.

- The knowledge of senior management in the Regional Office that staffing problems existed in the Information Office before [the] Appellant's recruitment, a situation which apparently played no part in [the Regional Director's] evaluation of Appellant's supervisory skills.

19. The Panel felt however, that it need come to no conclusion with respect tot he accusation of prejudice, because the decision of UNICEF with regard to Appellant's appointment was so tainted with procedural defects and irregularities that the Panel could base its conclusions and recommendations on those factors alone.

20. The Panel noted that the choice given to the APC … i.e. … either conversion to permanent appointment or non-renewal, was strictly in conformity with the terms of [administrative instruction] CF/AI/1990-10 of 13 December 1991 (…). Having expressed its doubts as to the objectivity of the Regional Officer, the APC recommended that Appellant be granted a permanent appointment, but the Deputy Executive Director (acting for the Executive Director) decided instead to extend his fixed-term appointment. The Panel noted that the Administrative Instruction makes provision for no such procedure, nor for extensions of fixed-term appointments to six years – or six and half as in the case of Appellant. Nor did Respondent put forth a satisfactory explanation for these departures from accepted procedure.

…

Conclusion and Recommendation

23. The Panel concludes therefore, that Appellant was denied fair consideration for conversion of his fixed-term appointment to permanent, and that his separation from service on 31 October 1996 resulted from a denial of due process.

24. The Panel recommends that Appellant be paid full salary and allowances and granted all entitlements – included, as appropriate, pension entitlements – to which he would have been entitled had he served until the age of retirement.

25. The Panel makes no further recommendation with respect to this appeal."

On 4 March 1998 the JAB amended its recommendation in paragraph 24 of its report. The new paragraph now stated:

"24. The Panel recommends that the Appellant be paid full salary and allowances and granted all entitlements – including, as appropriate, pension entitlements - to which he would have been entitled had he served until the end of the month in which [he would have] reached the age of sixty."

On 10 March 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has ... taken note of the Panel's conclusion that you were denied fair consideration for conversion of your fixed-term appointment to permanent, and that your separation from service on 31 October 1996 resulted from a denial of due process. In the light of the procedural irregularities, the Secretary-General has decided to accept the recommendation of the Panel regarding compensation, and, accordingly, had decided that you be paid full salary and allowances and granted all entitlements – including, as appropriate, pension entitlements – to which you would have been entitled had you served until 31 January 1998, the end of the month in which you reached the age of sixty.

...:"

On 18 March 1998, the Applicant wrote to the Under-Secretary-General for Management and pointed out that according to the Staff Regulations and Rules as well as the UNICEF Human Resources Manual, his retirement age was not 60 but 62, since he was hired after 1 January 1990. The Under-Secretary-General for Management responded on 30 March 1998 that "it was clear to the [JAB] and to me that your retirement age would have been 62 if you had continued to work with UNICEF. The date of 31 January 1998 in my letter [of 10 March 1998] simply served as the point in time on the basis of which I decided, based on the recommendation of the [JAB] that your compensation should be calculated".

On 28 June 1999, the Secretary of the JAB wrote to the Office of Legal Affairs confirming that the JAB "did not reconsider the [Applicant's] case, nor did the second report it adopted 'differ' from the first. When the Legal Adviser in [the Under-Secretary-General for Management's] Office asked for a clarification of the Panel's first report, the Secretary recognized that the recommendation as worded did not accurately reflect the discussion and

conclusion of the Panel. After consulting the Panel members, a second report was prepared to make clear that 'the date of retirement' to which it referred was the end of the month during which the Appellant reached the age of 60."

On 14 September 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Owing to the egregious nature of the treatment he has been afforded, the only appropriate remedy is to place him in the position he would have been entitled to had it not been for the conduct complained of. This would of necessity entail compensation through his anticipated date of retirement at the age of 62.

2. The subsequent dilution of the JAB recommendation was precipitated by cost saving considerations which are totally inappropriate and contrary to the notions of fairness and justice. The compensation which has been awarded is inadequate for the harm done to the Applicant's career and to his family.

Whereas the Respondent's principal contentions are:

1. The award to the Applicant of full salary, allowances and pension entitlements, to which he would have been entitled until the age of sixty, constitutes adequate compensation for the harm he suffered.

2. The decision by the JAB to replace its recommendation of 25 November 1997 with its recommendation of 4 March 1998 was not arbitrary or punitive and did not constitute a procedural irregularity.

The Tribunal having deliberated from 10 to 28 July 2000, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision of 10 March 1998, in which the Secretary-General accepted the JAB's recommendation to pay the Applicant "full salary and

allowances" and grant him "all entitlements ... to which [he] would have been entitled had [he] served until 31 January 1998, the end of the month in which [he] reached the age of sixty". The Applicant's underlying claims are that the denial of a permanent appointment resulted from procedural irregularities and discriminatory motivation. He further claims that the JAB erred as a matter of law and equity in failing to make a finding of prejudice in his case. He seeks a remedy of compensation for consequential damages over and above the compensation he was awarded earlier by the Secretary-General on 10 March 1998. He was awarded full salary, allowances as well as pension entitlements on the basis that he hypothetically had been in service until the age of 60.

II. The facts of the case are essentially as follows:

On 1 May 1990, after being internationally recruited by UNICEF, the Applicant was awarded a two year fixed-term appointment at the P-5 level, as Chief, External Relations Officer, in Amman, Jordan. This appointment was then extended for two years to 30 April 1994, for a total of four years in service. During his fourth year of service, in 1994, the Applicant became eligible for conversion to permanent status. The APC recommended that the Applicant's appointment be converted to permanent. However, the Regional Director, MENA, after a series of delays, recommended only a one year extension of his fixed-term appointment. The APC reconsidered the case and recommended instead that the Applicant's contract not be renewed beyond 31 October 1996.

III. The Applicant contends that he should have been awarded permanent status. He argues that while it is within the discretion of the Secretary-General to grant or deny permanent status, the exercise of that discretion may not be tainted by procedural irregularities or discrimination. The Tribunal has consistently upheld the right of staff members to receive fair and objective review. (Cf. Judgements No. 412, *Gross* (1988); No. 495, *Castellanos* (1990) and No. 507, *Fayache* (1991)).

The JAB found that the procedures followed by the Organization were tainted with procedural defects and irregularities and that the Applicant did not receive fair consideration. Despite a series of administrative delays, his appointment was extended so that he had ultimately

served more than six years on fixed-term appointment. The Applicant was eligible for APC review for conversion to permanent appointment after four years of service. It was in this review-for-conversion process that the Applicant alleges that procedural irregularity and discrimination occurred in which he was denied a fair and objective review. While the APC initially recommended a permanent appointment, he did not receive the appointment because of UNICEF's objections.

IV. The Tribunal agrees that the Applicant was denied fair consideration for conversion to a permanent appointment and that his separation from service on 31 October 1996 resulted from a denial of due process on both procedural and substantive grounds. The right to due process involves the right of the staff member to a timely and objective evaluation of his or her performance in regard to decisions affecting contractual status.

This Tribunal has held in Judgement No. 363, *de Franchis* (1986), paragraph VI, that:

> "... a fair and impartial assessment of performance must be considered an essential right of all staff members and ... consequently the Administration should not spare any means to secure unimpeachable reports. In that context, any steps of the Administration that could lead to an assessment of a staff member's performance that would be reasonably open to challenge may constitute a breach of the staff member's rights to have his performance assessed in an absolutely impartial way."

The Regional Director's assessment of the Applicant's performance and his recommendation with respect to the Applicant's contractual status lacked timeliness. Based on hearings, the JAB noted the "dilatory" fashion with which the Director dealt with the Applicant's PERs, and her "failure to act on the Ombudsman reports".

V. On the issue of prejudice, the JAB did not come to a conclusion with respect to the accusation of prejudice, because the decision of UNICEF with regard to the Applicant's appointment was so tainted with procedural defects and irregularities that the JAB could base its conclusions and recommendations on those factors alone.

The Applicant claims that the JAB erred as a matter of law and equity in failing to make a finding of prejudice in his case. The JAB consciously stopped short of looking into the

prejudice issue. This omission cannot be faulted, as a matter of law, particularly because the JAB found in favour of the Applicant. However, the Tribunal can examine the claim of prejudice on the basis of the evidence before it. The Applicant must provide evidence of prejudice and on the basis of the evidence before it, the Tribunal will determine whether there was prejudice (cf. Judgements No. 724, *Fussimanya-Reyna* (1995); No. 862, *Szekielda* (1997) and No. 897, *Jhuti* (1998)). The Tribunal concludes that the evidence on the record fails to prove that there was prejudice.

VI. The Applicant claims that in its first report dated 25 November 1997, the JAB recommended that, "the Appellant be paid full salary and allowances and granted all entitlements - included, as appropriate, pension entitlements - to which he would have been entitled had he served until the age of retirement". When approached by the Respondent, the JAB subsequently changed its report to specify age 60 as the Applicant's age of retirement. The Applicant argues that since his retirement age is 62, he is entitled to an award of full benefits until the age of 62.

The Applicant bases his argument on the Staff Regulations and Rules as well as on rules in the UNICEF's Human Resources Manual which stipulate that for those employees recruited on or before 1 January 1990, the age of retirement is sixty while for those recruited on or after 1 January 1990 the age of retirement is 62. UNICEF recruited the Applicant in May 1990. Accordingly, the Applicant's age of retirement is 62.

The record shows that, without notice to the Applicant, the Under-Secretary-General for Management approached the JAB asking for clarification of the term "retirement age" in the JAB's first report, indicating that the JAB could not recommend more than two year's salary. The Secretary-General believed that the recommendation as worded did not accurately reflect the discussion and conclusion of the JAB. After the Under-Secretary-General for Management consulted the JAB, a second report was prepared to make clear that "the age of retirement" to which it referred was at the end of the month during which the Applicant reached the age of 60 because they intended to award salary as if he had worked until the age of 60. The procedure followed by the Under-Secretary-General for Management lacked transparency, was irregular and amounted to an abuse of discretion. The JAB's report should not have been changed without

consulting the Applicant. Accordingly, the Tribunal decides that the Applicant should be additionally compensated, taking into account the compensation already paid by the Respondent.

VII. In view of the foregoing, the Tribunal:

(a) Awards the Applicant four months net base salary at the rate in effect at the time of his separation from service, in addition to the compensation he has already received;

(b) Rejects all other pleas.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/947
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 947

Case No. 1057: IBRAHIM

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas, on 15 December 1998, Farhan Ibrahim, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application containing pleas which read as follows:

"II. The pleas:

1. To consider this application as being filed within the time limit stated in article 7, paragraph 4, of the Statute of the Administrative Tribunal …

2. Alternatively, to suspend the provisions regarding time limits, according to article 7, paragraph 5 of the Statute.

3. To rescind the decision.

4. To fix 50,000 US$, as the appropriate remedy for the Applicant."

Whereas the Respondent filed his answer on 8 August 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA as an Area staff member, in the capacity of Teacher Training Instructor "D" at Ramallah Men's Training Center (RMTC), West Bank, effective 31 August 1961, on a temporary indefinite appointment. On 1 May 1988, he was promoted to the post of Deputy Principal and Chief Instructor, RMTC, grade 14.

On 7 November 1995, the UNWRA Headquarters Coordinator of Operations (HQ CO-OP), West Bank and Gaza, convened a Board of Inquiry (BOI) to "inquire about the handling of instructor's fees for administering the Comprehensive Examination in RMTC in 1994". It was alleged, in particular, that a fake list of participating teachers was submitted and the funds thus obtained improperly distributed. The BOI was asked to present its report no later than 20 November 1995. Its mandate was to determine, at least, the following:

(a) Whether the list of instructors was intentionally forged or whether the surplus remuneration came as a windfall;

(b) Whether the Senior Clerk and/or the Deputy Principal took/kept the surplus funds dishonestly; and,

(c) Whether and to what extend the Principal was involved.

In a letter received on 2 March 1996, the Applicant wrote to the Field Administration Officer (FAO), West Bank, stating that "for pressing family reasons", he had decided to take early voluntary retirement in accordance with Area staff rule 109.2, effective 1 May 1995, subject to approval. A handwritten notation on the letter states that "there is a Board of Inquiry currently into this [staff member's] involvement in misappropriation of funds, [please] do not release entitlements yet."

The BOI submitted its report to the HQ CO-OP on 16 April 1996. The BOI concluded, *inter alia*, that:

- The Deputy Principal had an opportunity to nominate staff at the RMTC for the practical part of the Comprehensive Exam in 1994 and two of the nominees were not working at the RMTC when the list was prepared. As the Deputy Principal had arranged with the Exam Board that

RMTC staff who contributed to the Exam would be remunerated, he knew which nominees were to be paid. As he was responsible for the compiling of the list, he must have known it was incorrect.

- The Senior Clerk collected the remuneration due from the Directorate Office of Education/Ramallah. He distributed remuneration to four staff only and gave the rest to the Deputy Principal.

- The Deputy Principal stated that he had used the surplus money to subsidize students' fees for needy students. However, there was no documentation of students' fees allegedly paid by the Deputy Principal from the surplus funds. It was proved that no authorization had been given to him to use the funds for that purpose. In addition, the fact that he paid back NIS (new Israeli shekel) 1,021 from his "pocket" to the Ministry was further reason to believe that he kept the amount dishonestly.

- The Deputy Principal confessed that he had made an administrative mistake in dealing with the surplus funds.

- The BOI could not deny the possibility of a conspiracy among staff at the Directorate Office of Education, the Senior Clerk and the Deputy Principal to misappropriate remuneration, but it could find no evidence thereof.

On 30 September 1996, the HQ CO-OP informed the Applicant that the BOI had established that he was guilty of misconduct and that, accordingly, it was decided to terminate his appointment for misconduct under Area staff regulation 10.2 and Area staff rule 110.1, with immediate effect. The actual date of separation was 19 November 1996.

On 27 December 1996, the FAO met with the Chairman, Area Staff Union, West Bank, who asked whether the HQ CO-OP had reconsidered the disciplinary action taken against the Applicant. The FAO told him that the HQ CO-OP had reconsidered the case and had decided that the decision should stand.

On the same date, the FAO wrote to the Applicant that his request for reconsideration had been denied.

On 5 January 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 28 April 1998. Its evaluation, judgement and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGEMENT

15. ...

(d) The Board also noted that the Appellant confessed that he had made an administrative mistake in dealing with the surplus of funds. This is a proof that there had been no conspiracy between the Appellant and the Senior Clerk. It is also worth mentioning that the Senior Clerk had been acquitted by the Commissioner-General ...

(e) The Board also noted that the Appellant was requested to remain in his post until the vacation during which time he kept his capacity as expending officer which implies that he enjoys the trust of his supervisors.

(f) The Board is of the opinion that the mistake lies in the first instance in the Directorate of Education which ... should not have handed the money to an unauthorized person.

(g) In this context, the Board is of the opinion that the disciplinary measures imposed on the Appellant are harsh, taking into consideration that the administrative mistake was made in good faith and unintentionally and that he had a good record throughout his long years of service with UNRWA.

IV. RECOMMENDATION

16. In view of the foregoing ..., the Board unanimously makes it recommendation that the Administration's decision appealed against be reviewed."

On 3 June 1998, the Commissioner General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

Your services with the Agency were terminated for misconduct following the findings of a Board of Inquiry. It had established that the Palestinian Authority was given a list of instructors, nominated for payment for the supervision of an examination at RMTC, which was false in that it included instructors who had not effected the work and were not entitled to payment. The Board of Inquiry concluded that you produced the list and that you knew the list was false.

The Board of Inquiry also established that you then received payment for the instructors who had not worked and kept the money yourself. You told the Board of Inquiry that you used this money to cover the fees of needy students. However, you agreed that you were not authorized to do this, could not prove that you had done so, and had repaid the money when your malpractice became known.

While you attempted to characterize this as an 'administrative mistake', based on the findings of the Board of Inquiry, the Administration took the view that your actions were deliberate and that you could only have had dishonest motives. The Administration also was of the opinion, with which I agree, that it could not ignore or treat lightly the dishonest acquisition and retention of educational funds by a staff member in the position of Deputy Principal, nor could it ignore the extreme embarrassment caused to the Agency by your actions in its relations with the Ministry of Education of the Palestinian Authority.

The Joint Appeals Board ignored the facts as found by the Board of Inquiry, without explanation, and proceeded on the basis of your explanation concluding that 'the administrative mistake was made in good faith and unintentionally'. It then compared your case to the case of ..., which is irrelevant as that was a case where the Board of Inquiry *did* find that an administrative mistake had been made. In short, the Joint Appeals Board failed to address the facts as found, failed to address the central issue of dishonesty, and made an irrelevant comparison.

...

In paragraph 15 (e) of the report, the Joint Appeals Board 'noted that the Appellant was requested to remain in his post until the vacation during which time he kept his capacity as expending officer which implies that he enjoys the trust of his supervisors'. However, this request implies no such thing. You were asked to stay on because the RMTC would otherwise have been unsupervised.

The Joint Appeals Board recommended that 'the Administration's decision appealed against be reviewed'. However, I do not believe that the Agency can be seen to condone fraud by a senior officer in a position of trust.

For these reasons, I am not prepared to accept the conclusions and recommendation of the Joint Appeals Board. Your appeal is dismissed."

On 15 December 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Because of the continuing closure of the West Bank, the Applicant faced difficulties in reaching the office of his Counsel. The application was prepared as soon as the circumstances allowed.

2. His appointment was terminated without "just cause" or "good cause". He admitted making an administrative mistake, however, he had done so with the intention to help needy students.

Whereas the Respondent's principal contentions are:

1. The application is not receivable as it is time-barred.

2. The Applicant misappropriated funds pursuant to the production of a false document, which was intended to deceive, and did deceive, in breach of the trust placed in him in his position of authority and responsibility. Thus, the Respondent was fully justified in terminating the Applicant's appointment for misconduct.

The Tribunal, having deliberated from 10 to 28 July 2000, now pronounces the following judgement:

I. Where a JAB has made a recommendation favourable to an applicant and the Respondent has rejected that recommendation, article 7, paragraph 4 of the Statute of the Tribunal provides that an application to the Administrative Tribunal shall not be receivable unless it is filed within ninety days of the rejection by the Respondent of the JAB's recommendation.

II. By letter dated 3 June 1998, the Applicant was informed of the Respondent's decision rejecting the JAB's recommendation and informed that his appeal against the decision to terminate his services for misconduct was dismissed.

The Applicant submitted his application to the Tribunal on 15 December 1998, which was more than ninety days after the time limit previously referred to had expired. Article 7, paragraph 5

of the Statute empowers the Tribunal to suspend provisions regarding time limits. The Tribunal has indicated in many instances in the past (Judgements No. 759, *Shehabi* (1996); No. 835, *Dia* (1997); No. 856, *Chowaniec* (1997); No. 873, *Patel* (1998); No. 913, *Midaya* (1999) and No. 938, *Oustinovitch* (1999)) that this power to suspend or extend time limits shall not be exercised unless it finds that genuine exceptional circumstances exist that would justify it in so doing.

In these proceedings the Applicant first asks the Tribunal to accept the late filing of his application by suspending the provisions regarding time limits or to consider the application as being filed within the time limit. In support of that application he offers the bald assertion that he "lives in Ramallah, while the office of [his designated representative (his Counsel)] is in Jerusalem. Due to the continuing [closure of] the West Bank (Ramallah), the Applicant faced difficulties in reaching the office. This application was prepared as soon as the circumstances allowed." He offers no information as to when he decided to apply to the Tribunal for relief against the decision complained of. He offers no information as to the efforts made by him to communicate with his Counsel during the relevant period. He offers no information as to the efforts made by him to travel to the office of his Counsel and when and how his plans (if any) were foiled. He offers no information as to why he could not instruct his Counsel by telephone or fax. He offers no information as to when contact was first made and instructions given and seeks to rely solely on the assertions already referred to.

With regard to this preliminary issue of receivability, the Respondent argues that there are no genuinely exceptional circumstances for suspending the provisions regarding time limits. In support of his opposition to the Applicant's request for suspension of the provisions regarding time limits, the Respondent exhibits a number of "constraints reports" from the Director of UNRWA Operations, West Bank, as part of the reporting procedures of the Agency for the relevant periods. These reports satisfy the Tribunal that the closures of the West Bank were few and short and that they, by themselves, could not constitute a justifiable or reasonable excuse for not having complied with the relevant time limit. Furthermore, as the Respondent points out, Counsel could have travelled from Jerusalem to Ramallah and telephones or fax machines could have been used. The Respondent concludes by arguing that the Applicant's Counsel could obviously have applied for an extension of time, made within a period of ninety days from 3 June 1998, had he been consulted in a timely manner. In the circumstances he submits that this preliminary application should fail.

III. The Tribunal is fully satisfied that no genuinely exceptional circumstances have been established and, accordingly, rules that the application is not receivable, being out of time.

IV. Although the Tribunal does not generally review on the merits of a case after ruling that the case is time-barred, it considers that this case is so unsustainable that it deserves comment The BOI had found that the list of persons who were purportedly entitled to remuneration as instructors for administering the comprehensive examination in question contained names of persons who were not participating instructors and, accordingly, were not entitled to such remuneration. Since the Applicant participated in drawing up the list he must have known that it was incorrect. The Tribunal is satisfied that this finding was amply supported by evidence and was a finding which the BOI was entitled to make.

The BOI further found that the Applicant had wrongfully received funds earmarked for such persons and that he had neither passed those funds on to the persons so nominated nor returned them to the Administration. Furthermore, the retention by the Applicant of monies earmarked for persons not entitled to the same is very strong evidence that the Applicant was aware they were not so entitled. Again, the Tribunal is fully satisfied that these findings were amply supported by evidence and were findings that the BOI was entitled to make.

Moreover the Applicant admitted to having received those monies and claimed that he had applied the funds so appropriated by him towards subsidizing fees for needy students or alleviating financial hardship suffered by such students. This aspect was hotly contested by the Respondent and the Applicant was unable or unwilling to present evidence from any allegedly needy student or to produce any documentation to establish that such payments had been made.

V. In the circumstances, the Tribunal is fully satisfied that the Respondent was entitled to treat the findings of the BOI as having established dishonesty on the part of the Applicant. Even if the Applicant had been able to satisfy anyone that the "surplus fees" had been applied by him towards subsidizing needy students (which he was clearly unable to do) the Respondent would have been fully entitled to have found that the Applicant was guilty of serious misconduct. No circumstances are conceivable whereby an employee of the Agency who received fees or other remuneration on behalf

of other nominated persons could be justified in applying them in a different manner altogether, even if the different manner was of a philanthropic nature. His duty would have been to return those fees to the appropriate authority with an explanation. Even diverting them towards other purposes, no matter how noble, would have amounted to misconduct. The Tribunal is fully satisfied, even on the facts accepted and admitted by the Applicant, that he was guilty of misconduct, and that his actions caused real embarrassment to the Agency. His behaviour was wholly unbefitting a person who occupied a position such as the Applicant's. It would do violence to language to characterize, as was done by the JAB, such conduct as "an administrative mistake".

VI. For the above reasons, the Tribunal:

(i) Decides that the application is not receivable, since it is time-barred;

(ii) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/948
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 948

Case No. 1049: ZHU

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 28 June 1998, Weiyi Zhu, a former staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 October 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

"**PLEAS**

A. Preliminary Measures

The Applicant respectfully requests this Tribunal to order the Respondent to produce the following documents:

1. The two assessments concerning the Applicant's performance as verbatim reporter for the General Assembly of the United Nations in 1987 and 1988.
2. The letter jointly submitted to a former UN Secretary-General by 31 colleagues of [the Chief of the Chinese Unit].

The Applicant applies for oral proceedings and respectfully requests this Tribunal to hear the following witnesses:

...

B. The Contested decisions

1. One-year extension of a two (2) year fixed-term contract;
2. Withholding the promotion to P-3.

C. Compensations:

1. Reinstatement at P-3 level on fixed-term contract;
2. US $ 100,000 for damages caused by
   a. the contested decisions;
   b. the discrimination against the Applicant, and persistent wrongful obstruction of the Applicant's appeals;
3. Legal fees and ... costs in the amount of US $ 110,000."

Whereas the Respondent filed his answer on 22 February 2000;

Whereas the Applicant filed written observations on 12 April 2000;

Whereas, on 18 July 2000, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 23 February 1990, as an Associate Translator. He was offered a two-year fixed-term appointment at the P-2 level. His letter of appointment specified under Section 5, "Special conditions" that he was on "secondment from [the] Chinese Government". In accordance with the Agreement between the United Nations and the United Nations Industrial Development Organization (UNIDO) for the Transfer, Secondment and Loan of Staff of 1985, the Applicant was assigned to the UNIDO Department of External Relations, Public Information, Languages and Documentation Services (EPL), in Vienna, keeping his United Nations contractual status. On 24 August 1992, the Applicant separated from service.

In September 1991, the Applicant's supervisor, (the Chief of the Chinese Unit) submitted his performance appraisal report for the period 23 February 1990 to 22 February 1991. According to the supervisor, the Applicant had "Partly achieved the expected results".

On 7 October 1991, the Applicant and a colleague addressed a memorandum to the Head, Translation Section, the Director, Languages and Documents Division (LD) and the Deputy Director-General, EPL, complaining that their supervisor "out of his personal prejudice", had scaled down their performance rate, contrary to UNIDO's standards and procedures. According to the two staff members, the supervisor's explanation was that with the salary reduction practice coming to an end (as of March 1991, Chinese Translators were allowed to keep their full salaries), the criteria applied to them should be higher than those applied to their predecessors and that he did so because he was under "external pressure". Subsequently, the Applicant's rating was changed to "Fully achieved the expected results".

On 30 January 1992, the Director, LD, met with the Applicant, in the presence of the Head, Translation Section. He advised the Applicant, *inter alia*, to improve his performance, to change his attitude and to be more receptive to the professional recommendations of his colleagues. On 31 January 1992, the Director, LD, wrote to the Applicant to inform him that, in view of his positive reaction to their conversation, he recommended to award his salary increment.

On 12 February 1992, the Chief, Personnel Administration Section, UNIDO, wrote a memorandum to the Director, Staff Administration and Training Division, Office of Human Resources Management (OHRM), referring to an earlier report of the UNIDO joint working group for the review of the contractual status of staff members of the Languages and Documentation Division on secondment. The working group, even though stating that the Applicant had "fully achieved expected results", felt that he needed to make more efforts to learn from the revisers comments and recommended a "one-year extension of fixed-term appointment".

Following OHRM's approval, the Applicant was offered and accepted a one-year appointment effective 23 February 1992. The letter of appointment stated he was no longer considered on secondment from the Chinese Government.

On 5 August 1992, the Applicant wrote to the Director of Personnel, UNIDO, stating that he "offered to resign from UNIDO and thereby from UN for various reasons". The Applicant wrote another letter of resignation addressed to both the Secretary-General and the Director-General, UNIDO, on 6 August 1992, stating that his resignation would be "effective as of 24 August 1992". On 7 August 1992, a UNIDO Personnel Officer replied to the Applicant,

waiving the official one-month notice period and accepting the resignation as of 24 August. On 12 August 1992, the UNIDO Personnel Officer advised OHRM by facsimile of the above.

On 9 March 1993, the UNIDO Personnel Officer forwarded to the Applicant the performance appraisal report covering his service for the period 23 February 1991 to 24 August 1992.

On 24 March 1993, the Applicant replied to the UNIDO Personnel Officer pointing out that, since his service during the covered period was "fully successful", his supervisor was not "justified or excused" in withholding the recommendation for his promotion to P-3. He asked that he be given a "retroactive promotion along with the raised pays".

On 27 May 1993, the Applicant wrote to the Deputy Directors-General of the Departments of Administration and EPL, requesting to be re-employed, alleging that he "was pushed to resignation" by the actions of his supervisor. On 24 June 1993, the Director, Personnel Services Division, UNIDO, replied to the Applicant that, due to severe budgetary constraints, UNIDO was forced to apply strict policies leading to staff reduction, preventing, for the time being, any regular recruitment.

On 29 August 1993, the Applicant lodged a complaint with the UNIDO Joint Appeals Board (UNIDO JAB). The UNIDO JAB submitted its report on 30 March 1995. Having declared itself competent, it rejected the appeal, concluding that "the appealed decision was not unlawful and was not invalidated by a number of irregularities brought forward by the Appellant". On 25 April 1995, the Director-General, UNIDO, endorsed the conclusions of the UNIDO JAB.

On 10 June 1995, the Applicant filed a complaint with the Administrative Tribunal of the International Labour Organisation (ILOAT). In its Judgment 1059 of 11 July 1996, the ILOAT declared itself incompetent to entertain the claim.

On 22 December 1996, the Applicant filed an appeal with the Vienna JAB. The JAB issued its report on 11 May 1998. Its observations, conclusions and recommendation read as follows:

"*Observations and Conclusions*

18. The Panel noted that the decision to grant the Appellant a one-year extension of his fixed term appointment at the P-2 level, thereby withholding his promotion to the P-3 level, did not violate the Appellant's letter of appointment ...

...

20. ... After examining the materials before it, the Panel was unable to find any evidence of prejudice or any other extraneous factor on the part of the Respondent or on the part of the working group ... on whose recommendations the Respondent based the impugned decisions.

21. As regards the Appellant's claim for reinstatement or re-employment at the P-3 level, the Panel noted that there is no right to reinstatement [staff rule 103 (a)], and that the said claim resulted from the resignation of the Appellant, which is a separation initiated by the Appellant. The Panel recognised that there might have been difficulties in the Chinese Translation Unit during the Appellant's service, it noted with concern that the Appellant's first and second performance appraisal reports ... were submitted late, but that all things considered, the Appellant has not demonstrated that he had no opportunity to address his grievances through the internal procedures, such as rebuttal of his performance appraisal; or that conditions under which he worked were so egregious so as to make his resignation involuntary. Moreover the Appellant's immediate supervisor ... was replaced by another supervisor, two months before the Appellant's resignation. The Panel thus concluded that the Appellant has failed to prove that his resignation was involuntary. As regards the claim for re-employment, it noted further that there is no reason why the Appellant could not apply for vacancies within the Secretariat, and that he would no doubt, be given an equal opportunity like other applicants.

Recommendation

22. In light of the foregoing observations and conclusions, the Panel could not recommend the granting of the relief sought by the Appellant."

On 5 June 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has ... taken note of the [JAB's] findings that, in regard to the one year extension of your fixed-term appointment, the terms of your

> appointment were not violated, proper procedures were followed, and there was no evidence of prejudice or any other extraneous factor. In respect of your claim for reinstatement or re-employment at the P-3 level, the Secretary-General has taken note of the [JAB's] finding that your separation was initiated by your resignation, that you had failed to prove that your resignation was involuntary, and that you had no right to reinstatement ... The Secretary-General has further noted that the [JAB] did not recommend the granting of the relief you requested, and, accordingly, he has decided to take no further actions in your case".

On 29 October 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's performance appraisal report indicates he "fully achieved the expected results" and therefore he was entitled to a two-year extension of his contract and promotion to the P-3 level. The decision to grant him only a one-year extension and to deny him a promotion violated his rights.

2. The Applicant claims that his resignation was coerced. He was forced to work under very difficult circumstances because his immediate supervisor treated him unfairly and discriminated against him.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to or expectancy of a promotion. The decision to extend the Applicant's appointment for one year only and not to promote him was a proper exercise of the Secretary-General's discretionary authority and was not vitiated by prejudice or other extraneous factors.

2. The Applicant has not produced any evidence substantiating his claim that he was coerced to resign from service.

The Tribunal, having deliberated from 13 to 28 July 2000, now pronounces the following judgement:

I. The Applicant appeals the decision of 5 June 1998, in which the Respondent accepted the JAB's recommendation against granting the Applicant the relief he requested. The Applicant claims that under his fixed-term appointment he had a "legal expectancy" of renewal. He also claims that he was entitled to a two-year extension of his appointment and promotion to the P-3 level and that this was denied solely because his supervisor was prejudiced against him.

II. Insofar as the case concerns the legal expectancy involved in the renewal of fixed-term appointments, the Tribunal affirms the recommendation of the JAB, and the Respondent's acceptance of this recommendation.

As a fixed-term employee, the Applicant's expectations were squarely governed by staff rule 104.12 (b) (ii) which stipulates:

> "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

The Tribunal has consistently held that employment with the Organization ceases on the expiration date of fixed-term appointments and that a legal expectancy of renewal is not created by efficient or even by outstanding performance. (Cf. Judgements No. 719, *Kartsev* (1995); No. 726, *Hamza* (1995); No. 795, *El-Sharkawi* (1996); and No. 907, *Salvia* (1998)).

Additionally, the Applicant has produced no evidence of expectancy based on formal or informal promises made to him, which might be grounds for a "legal expectancy" based in estoppel.

III. The Applicant based his argument that he was entitled to promotion to the P-3 level on his claims that his performance was rated fully successful and he maintains that the denial was a result of prejudice against him. However, the Applicant's performance records are in fact mixed. They show improvement over time, but were not unblemished overall. In any event, promotion is strictly at the discretion of the Secretary-General.

As a translator, any promotion to which the Applicant may have been entitled was governed by rules particular to translators, i.e., UN Personnel Directive PD/9/59 of 4 March

1959, "*Policy for the recruitment and promotion of translators and translator-précis-writer trainees*".

According to Section II (c) of PD/9/59, the basis for promotion is discretionary:

> "If upon completion of two years of service, the performance of a staff member originally recruited on a fixed-term appointment cannot be certified as warranting promotion to the P-3 level, the Office of Personnel Service may, without referral to the Committee, grant an extension of appointment - at the P-2 level - for a further period not to exceed one year. If at the end of this period he or she is certified as in (b) above as giving fully satisfactory service, he or she may be offered a new fixed-term appointment at the P-3 level."

This provision shows clearly that promotion is not compulsory but discretionary, as indicated by the word "may".

IV. The second issue raised by the Applicant concerns his resignation and request for reinstatement. It is undisputed that the Applicant offered to resign on 5 August 1992, tendered his formal resignation to the Organization on 6 August 1992, and that his resignation was accepted. The Applicant argues, however, that his resignation was not voluntary. He pointed to extremely poor working conditions under his supervisor and the partial attitude displayed by the supervisor to him as the background reasons for his resignation, calling the working conditions "coercive". There are strong indications in the record that all was not well in the Chinese Translation Unit. However, the Applicant does not explain why he felt the need to resign, even though the supervisor was replaced as head of the office two months prior to his resignation.

The burden of proving that his resignation was coerced was on the Applicant. According to both the UNIDO JAB and the Vienna JAB, the Applicant did not produce any convincing evidence to substantiate his claim that he was coerced to resign from service. Similarly the Tribunal finds that he evidence on record fails to prove that his resignation was coerced. Thus, the Tribunal concludes that the Applicant's resignation was voluntary. As such the Applicant is not entitled to reinstatement.

V. The Tribunal recognizes that there were difficulties in the Chinese Translation Unit during the Applicant's period of service, which were detrimental to him. In addition, the

Tribunal notes with concern that there were substantial delays in the preparation of the Applicant's first and second appraisal reports, preventing him from submitting timely rebuttals. Accordingly, the Tribunal awards the Applicant compensation.

VI. In view of the foregoing:

(a) The Tribunal order the Respondent to pay to the Applicant three months net base salary at the rate in effect at the time of his separation from service, as compensation;

(b) All other pleas are rejected.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/949
28 July 2000

ORIGINAL: ENGLISH

ADMISTRATIVE TRIBUNAL

Judgement No. 949

Case No. 966: AFAWUBO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Kevin Haugh; Ms. Marsha A. Echols;

Whereas, on 30 December 1998, Mensah Novito Afawubo, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application, in which he requested, in accordance with article 11 of the Statute of the Tribunal, the interpretation and revision of Judgement No. 884, rendered by the Tribunal on 4 August 1998;

Whereas the application contained pleas which read, in part, as follows:

"SECTION II. PLEAS

...

12. ... in view of recent events which I became aware of last 28 October 1998, **after** Judgement No. 884, and duly brought to the Tribunal's knowledge on 19 November 1998 ..., events relating to a situation which, today, represents the self-evident culminating point of the admittedly long-standing financial mismanagement I drew attention to in 1993 in the Conakry UNHCR Office but with my call not being heeded, I request the Tribunal to revise its Judgement No. 884 and *rule conclusively, as*

regards my said reassignment from Conakry in 1994, that UNHCR's Administration in fact acted inappropriately by simply removing me from the duty station without the necessary prior investigation into the prevailing financial malpractices I then vainly sought to expose, and which have now finally come to light.

13. As far as compensation is concerned regarding reparation of the injustice of that victimizing reassignment, unless the Tribunal itself decides to award me some kind of special damages ..., I wish, for my part, to reiterate that I request no monetary compensation but, rather, UNHCR Administration's *post factum* written acknowledgement that it indeed acted inappropriately in precipitately reassigning me away from a duty station without having carried out, as would have been expected of any responsible Administration, an inquiry into my complaints of being victimized for my exposure of misuse of the Organization's financial resources. But, in the event of such discretionary award of special damages by the Tribunal, the indispensable condition for my acceptance thereof would be that those officials then responsible for the serious negligence constituted by the failure to investigate the matter, be made to bear if but a symbolic part of the said damages rather than the Organization alone being requested to pay the total amount."

Whereas on 4 June 1999, the Applicant submitted an additional document expanding on his plea for compensation as follows:

"...

3. In view of the [remand of my case ... to the Geneva Joint Appeals Board (JAB)] pursuant to article 9, paragraph 2, of the Statute of the [Administrative Tribunal], I hereby request payment of compensation ..., on grounds of the prejudice caused to me as a result of the *procedural delay* in the definitive clarification of my career development situation ...

..."

Whereas the Respondent filed his answer on 23 November 1999;

Whereas the Applicant filed written observations on 16 December 1999;

Whereas the Applicant submitted additional documents on 30 March and 30 June 2000;

Whereas the facts of the case were set out in Judgement No. 884.

Whereas the Applicant's principal contention is:

On 28 October 1998, the daily newspaper *Le Temps* of Geneva (Switzerland) revealed the discovery of a financial scandal at the UNHCR Branch Office in Guinea-Conakry, which led to the transfer of the Representative under whom the Applicant served as Programme Officer and suffered the alleged victimization in 1994 for having exposed the "type of malpractices that had now surfaced". In view of the news story which highlights the inappropriateness of UNHCR's attitude towards the Applicant, Judgement 884 must be revised.

Whereas the Respondent's principal contention is:

Publication of a newspaper article is not a sufficient reason for revising the judgement, which remanded the case to the JAB to investigate the circumstances of the case and to review all the issues raised by the Applicant in the original application.

The Tribunal, having deliberated from 4 to 28 July 2000, now pronounces the following judgement:

I. The Applicant has submitted a double application, requesting both an interpretation and revision of the Tribunal's Judgement No. 884 rendered on 4 August 1998, by which the Tribunal remanded the case to the JAB for a re-examination of the Applicant's claims. The Applicant requests an interpretation of Judgement No. 884 with regard to two issues and further requests a revision of the same Judgement based on the assertions in an October 1998 newspaper article.

II. The Applicant seeks both an interpretation and a revision of Judgement No. 884 with regard to the denial of promotion to the L-3 level and granting a Longer-Fixed-Term Appointment in 1993.

With regard to the Applicant's request for an interpretation of Judgement No. 884, the Tribunal notes that the Statute of the Administrative Tribunal does not contain an express provision relating to the interpretation of judgements. However, as early as 1954 the International Court of Justice in an advisory opinion held that, "competence to interpret was inherent in the judicial function

(of the Tribunal)." Further, in Judgement No. 61 (1955) the Tribunal found that the competence of national and international courts to interpret their own judgements is generally recognized. Also, in Judgement No. 434, *Al-Ali* (1988) the threshold question before the Tribunal was whether an application could properly be characterized as a request for an interpretation of the Tribunal's final judgement, in which case it would be within the competence of the Tribunal, or whether the application sought relief beyond that judgement on the basis of subsequent events, in which case the application would not be within the competence of the Tribunal under article 7 of its Statute. In Judgement No. 434, the Tribunal held that:

> " ... the application may not properly be understood as a request for interpretation, and it does not even purport to be a request for revision under article 12 of its Statute. ... It follows that the application must be viewed as seeking to initiate a new proceeding for further relief, and that appeal to a JAB from a decision by the Secretary-General or consent by the Secretary-General to a direct appeal to the Tribunal, is a prerequisite to the Tribunal's competence."

Similarly, in this case it is within the Tribunal's competence to interpret and clarify. However, here the Applicant does not request an interpretation of the previous ruling but instead, in reality, seeks a pronouncement on the merits of the denial of his promotion to the L-3 level and to a Longer-Fixed-Term Appointment. The Tribunal finds that: (i) the Applicant does not request an interpretation, but rather a ruling on the merits; and (ii) it is the responsibility of the JAB to investigate the circumstances surrounding these events. (Cf. Judgement No. 884). The Tribunal holds that the request for interpretation is rejected.

III. The Applicant also requests that the Tribunal revise Judgement No. 884 based on the publication of an article in a Swiss newspaper *Le Temps*, dated 28 October 1998. The article revealed the discovery of a financial scandal at the UNHCR Branch Office in Guinea-Conakry, the duty station from which the Applicant had been reassigned.

Article 11 of the Statute of the Tribunal stipulates that the Applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery:

> "... of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence."

Accordingly, to come within the ambit of article 11, the "fact" relied upon must be a state of affairs that existed at the time the judgement was given. The newspaper article was not published until two months after the judgement was given and accordingly cannot constitute a newly discovered fact.

Furthermore, the publication of the newspaper article does not constitute a "decisive factor" which, had it been known prior to rendering the judgement, would have changed the ruling. The Tribunal remanded the case to the JAB, to review all factual circumstances raised by the Applicant, and the Tribunal did not rule on the merits of the appeal (See Judgement No. 884).

The fact that a newspaper published an article relating to the case at hand does not substitute for the review of all issues in the case by the JAB. The Applicant may submit the new documents to the JAB. If the outcome of the proceedings of the JAB are not satisfactory to the Applicant, he may appeal to the Tribunal. Therefore the Tribunal holds that the request for revision is rejected.

IV. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Mayer GABAY
Vice-President, presiding

Kevin HAUGH
Member

Marsha A. ECHOLS
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/950
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 950

Case No. 975: ABBAS

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Victor Yenyi Olungu; Ms. Marsha A. Echols;

Whereas, on 7 April 1999, Yaser Abbas, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application in which he requested, in accordance with article 11 of the Statute of the Tribunal, revision of Judgement No. 874, rendered by the Tribunal on 31 July 1998;

Whereas the application contained pleas which read, in part, as follows:

> "9. Whereas [the letter dated 21 June 1977 from the Director of UNRWA Operations, West Bank, to the Chairman of the Executive Council of the Staff Union, West Bank, containing a legal opinion from the Agency's General Counsel, which the Applicant was able to obtain recently], and [the application] ... provide conclusive evidence that [the] Respondent had violated [the Staff Regulations and Rules with regard to the Applicant's] resignation [in] that [the] letter of acceptance of resignation [was backdated deliberately] to indicate it was [written] prior to the withdrawal of [the] resignation ... [the] Tribunal is

prayed please, to order revision of judgement, and hold according to [the] pleas as submitted in the [original] application.

..."

Whereas the Respondent filed his answer on 15 June 1999;

Whereas the Applicant submitted an additional document on 1 July 1999;

Whereas the Applicant filed written observations on 11 September 1999;

Whereas the Respondent submitted comments on the Applicant's written observations on 4 January 2000;

Whereas the facts of the case were set out in Judgement No. 874.

Whereas the Applicant's principal contentions are:

1. The Respondent, determined not to allow the Applicant to withdraw his resignation, manipulated the date of the letter of acceptance of the resignation.

2. The Respondent concealed the letter dated 21 June 1977 written by the Director of UNRWA Operations, West Bank, although its contents were relevant in the case.

3. The Respondent attempted to mislead the Tribunal by not providing it with UNRWA's standing policy as documented in Personnel Directive A/9, paragraph 3 of Part V, as set out in the letter of 21 June 1977.

Whereas the Respondent's principal contentions are:

1. The Applicant has given no details about when he discovered the letter dated 21 June 1977, save that he said that he was able to obtain it "a few days [before 7 April 1999]". Consequently there is insufficient evidence that the application was made within thirty days of the discovery of the fact, as required by article 11.

2. The letter of 21 June 1977 was not concealed. The opinion expressed in the letter was based on an examination of the 1977 language of Area staff rule 109.6 and Personnel Directive

A/9, which was redrafted in 1989 to remove the phrase "all resignations will be acknowledged by official letter which will confirm the date of separation". Accordingly, the opinion in the letter was not correct at the time of the Applicant's resignation.

3. The production of the letter of 21 June 1977 is not a "decisive factor" which would have caused the Tribunal to conclude otherwise than it did in paragraph VI of Judgement No. 874.

The Tribunal, having deliberated from 14 to 28 July 2000, now pronounces the following judgement:

I. The Applicant has submitted an application, requesting revision of Judgement No. 874.

II. Paragraph I of the Tribunal's judgement, which is the subject of this request for revision, reads as follows:

> "The principal issue raised by the Applicant is whether, under the applicable rules, a resignation becomes effective only after it has been accepted by the Respondent. ... the Tribunal finds that a resignation becomes effective when submitted and does not require the Respondent's approval to become effective. Any other finding would make a staff member's desire to discontinue his or her service subject to the Respondent's control - a result clearly not contemplated by the Staff rules related to resignation. Because the Tribunal finds that the resignation was effective upon submission, the arguments by the Applicant regarding the timing of the Respondent's 'acceptance' and of the Applicant's 'withdrawal' are irrelevant."

III. The new fact invoked by the Applicant is the discovery of a letter by the Director of UNRWA Operations, West Bank, to the Chairman of the Executive Council of the Staff Union, West Bank. The Tribunal takes note of the date of that letter: 21 June 1977.

IV. It appears from the letter that the Chairman of the Executive Council of the Staff Union had asked the Director of UNRWA Operations a question regarding the legal aspects of the Agency's refusal to accept the withdrawal of a resignation. It also appears that the Director of UNRWA Operations had "Inasmuch as this was a legal question" referred it to Headquarters and that "it was taken to the Agency's General Counsel for advice".

V. The first sentence of the operative part of the General Counsel's reply, quoted in the letter, reads as follows:

> "It appears from the general tenor of staff rule 109.6 that a resignation is not a unilateral act and needs therefore to be accepted".

The Tribunal notes that the version of staff rule 109.6 referred to in the General Counsel's reply was the one applicable in 1977.

This interpretation - the letter goes on to say - is supported by paragraph 3 of Part V of Personnel Directive A/9 (also the version applicable in 1977), which states that "all resignations will be acknowledged by official letter which will confirm the date of separation."

VI. As the Applicant contends, staff rule 109.6 must be interpreted in conjunction with Personnel Directive A/9. In fact, staff regulation 9.2 is also pertinent. It reads as follows: "Staff members may resign from the Agency upon giving the Commissioner-General the notice required under the terms of their appointment."

VII. Article 11 of the Statute of the Tribunal authorizes the revision of a judgement "on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence."

VIII. Should the Tribunal find that the discovery of the letter containing the General Counsel's opinion is a new fact within the meaning of article 11, it would then have to determine what influence, if any, the interpretation of the General Counsel might have had on the Tribunal's own interpretation of the legal effect of tendering a resignation as expressed in its Judgement No. 874.

IX. A first consideration is that the Tribunal is not bound by the legal opinion of the General Counsel. On the contrary, where there is a conflict between the General Counsel's opinion and that of the Tribunal, it would be the Tribunal's opinion that would prevail.

X. It is clear from the letter that the General Counsel based his interpretation on the word "acknowledged" contained in the text of Personnel Directive A/9. Acknowledgment of a resignation, however, is far from being equivalent to its "acceptance". "Acknowledgment" is the mere notice of receipt. Thus, the Tribunal does not find that it would have come to a different conclusion, had the text in question been in force at the time Judgement No. 874 was issued.

XI. In addition to determining whether the new fact was a decisive fact as stipulated in article 11, the Tribunal must also consider whether the fact relied upon was a state of affairs that existed at the time the Judgement was rendered. In this connection, the Tribunal notes that the alleged "new fact" was in reality an "old fact". The letter was written in 1977 and the versions of staff rule 109.6 and Personnel Directive A/9 referred to in the letter are both dated 1968. Both have gone through various revisions and, in the version of Personnel Directive A/9 applicable at the time the Judgment was given (the current version which became effective in 1989), the reference to the acknowledgement of resignations has been deleted. Thus, the Tribunal finds that the "new fact" alleged by the Applicant has no bearing on its interpretation as expressed in Judgement No. 874 and that the judgement remains valid.

XII. In the light of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Victor YENYI OLUNGU
Member

Marsha A. ECHOLS
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/951
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 951

Case No. 1043: AL-KHATIB

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas, on 7 May 1998, Samir Abdullah Ahmed Al-Khatib, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 September 1998, the Applicant, after making the necessary corrections, again filed an application containing pleas which read as follows:

"**II. Pleas**

To be returned into my post since the Field Administration Office - Jordan terminated me from my job on the basis that a woman claimed that I have made sexual relation with her (raped her) at the Area Office on Tuesday 8-10-1996 at 15.30 hrs."

Whereas the Respondent filed his answer on 31 March 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on a temporary indefinite appointment on 2 January 1991 as an Area staff member in the capacity of Sanitation Labourer, grade 1, at Baqa'a Camp, Jordan. Effective 1 January 1993, he was transferred to the post of Doorkeeper/Cleaner at the North Amman Area Office, Jordan.

On 17 October 1996, the Area Officer, North Amman, Jordan, notified the Field Personnel Officer and Deputy Field Administration Officer (D/FAO), Jordan, that the Applicant had been arrested by the police at the North Amman Area Office the previous day. He stated that a policeman accompanied by a lady had come to the Area Office, and that the lady had claimed that the Applicant had "made sex with her" at the Area Office on 8 October 1996. The Applicant was suspended without pay on the same date.

In a memorandum dated 29 October 1996, the Area Officer, North Amman, informed the Field Personnel Officer and D/FAO, that the Applicant had come to his office that day and provided certain documents concerning his release. He inquired whether the Applicant should be allowed to resume duty.

On 23 January 1997, the Area Officer, North Amman, informed the Field Personnel Officer and D/FAO that the court verdict in the Applicant's case had still not been announced even though the Applicant, who was already released on bail, had attended several court sessions on the case.

On 4 March 1997, the Applicant wrote to the Director of UNRWA Operations, Jordan, requesting approval to return to work.

By letter dated 31 March 1997, the Field Administration Officer (FAO), Jordan, informed the Applicant that his return to work could not be considered until he had provided either a final court judgement or a copy of the charge sheet issued against him. The Applicant was requested to provide such documentation no later than 20 April 1997, otherwise the Agency might be "obliged to consider the termination of his services".

On 5 April 1997, the Great Criminal Court issued a "decision" that it had found the Applicant innocent of the accusations against him, but stated that "this verdict [was not] the final court judgement". On 7 April 1997, the Area Officer, North Amman, sent a copy of the judgement to the FAO. On 11 May 1997, the Area Officer wrote a memorandum to the Officer-in-Charge, Department of Administration, Jordan, resubmitting another copy of the court judgement which was now marked "TRUE COPY, THE JUDGEMENT BECAME FINAL".

According to a Note for the record dated 11 June 1997, the FAO and the D/FAO met with the Applicant "in order to find out whether a quick decision about his reinstatement could be taken". During the meeting, the Applicant was questioned in detail about the circumstances of the case, but the FAO and the D/FAO found his answers inconsistent:

- He continued to be held in custody although the accusing woman had said at the police station that it was not the Applicant who had attacked her, but someone else by the same name;

- The Applicant's family had entered into an agreement with the woman's family, called an "Atwa" under Jordanian tribal traditional law. The Applicant could not give convincing reasons why his family would have entered into such an agreement, which implies that the person is guilty. Especially in a case of rape, it is unlikely they would have done this simply to keep the peace between the families or if the Applicant were innocent;

- According to the Applicant, the woman demanded money to give up her rights and withdraw the case, and she was paid a considerable amount. When the Applicant was asked why his family paid so much money, this being an acknowledgement of guilt, he stated that his family was not aware of this.

On the same date, the Acting Director of UNRWA Operations, Jordan, wrote a letter to the Senior Administration Officer, Headquarters, Gaza, and informed him of his intention terminate the Applicant's services in the interest of the Agency. The Acting Director felt that it was "impossible also for cultural reasons, to reinstate [the Applicant] at the same Area Office post because the staff there, in particular the female ones, would neither understand nor accept his return to his previous work place. In addition, there [was] credible information that [the Applicant did] not observe due restraint vis-à-vis female visitors to the Area Office and there [was] no reason to expect he [would] do otherwise in another area".

On 3 July 1997, the Officer-in-Charge, UNRWA Operations, Jordan, wrote to the Applicant and informed him of the decision to terminate his services in the interest of the Agency under Area staff regulation 9.1 and staff rule 109.1, effective that date. He said the charge of rape and the circumstances of payments to the complainant had harmed the Agency's image and cast strong doubts on the Applicant's personal conduct and reliability. He added that the Agency had lost confidence in the Applicant and could not trust him to work for it with "this moral miasma surrounding" him.

In an undated letter to the Director of UNRWA Operations, which was received on 16 July 1997, the Applicant requested a review of the decision to terminate his appointment. In his reply of 28 July 1997, the Director of UNRWA Operations stated that the Agency had lost trust in the Applicant and that the decision to terminate him stood.

On 5 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

In an undated letter, which was acknowledged by the JAB on 4 November 1997, the Applicant petitioned the Director of Administration and Human Resources Management to reinstate him. He attached a document issued by local "Moktars". The document explained that an "Atwa" in that locality, constitutes an agreement between "tribes" to cease a conflict for a period of time until an issue has been investigated. It further explained that where an accused is found innocent, the money paid in connection with the Atwa is refunded by the complainant.

The JAB submitted its report on 1 March 1998. Its evaluation, judgement and recommendation read, in part, as follows:

"**III. EVALUATION AND JUDGEMNT**

18. ...

c) By reference to the court judgement, the Board noted that paragraph 6/3 stated '*... that the complainant had already done this before ...*', also paragraph 6/4 states that '*it was evident from the statement of the mother of the complainant that her daughter sometimes imagines things which are untrue.* She added that *her daughter had already lodged a complaint against someone, but the court discharged him*", furthermore paragraph 6/V states that '*when the complainant saw the accused, Sameer, she said that [it] wasn't him.*' Also

paragraph 6/VI states that '*as seen from these contradictions, the court is not of peaceful mind and does not trust the statement of the complainant and found it unreliable ...* ' Accordingly the court decided to declare the accused as innocent and discharged him.

d) The Board also noted that since the Appellant was declared innocent then there is no evidence that he harmed the Agency's image, but on the contrary his own image and reputation were harmed for no strong reason.

e) The Board is of the opinion that the Administration did not take the final decision of the court into consideration, ..., by reference to [the letter dated 31 March 1997 from the FAO to the Applicant] which states '*your return to work cannot be considered before providing us with a final court judgement or, at least a copy of the charge sheet issued against you'*.

IV. RECOMMENDATION

19. In view of the foregoing ..., the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed with a view to reinstating the Appellant and that his absence as from 3 July 1997 be dealt with in accordance with standing UNRWA Rules and Regulations".

On 22 April 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

While I note that the criminal proceeding against you did not result in a conviction, I also note that the standard of proof in a criminal case is higher than that which bound the Administration in its consideration of whether your continued employment was in the best interest of the Agency. Moreover, I cannot accept the Board's finding that the whole affair has not harmed the Agency's good image in Jordan. I am also concerned that the Board appears to have overlooked the fact that the Administration did consider the acquittal in reaching its decision and ignored the fact that your family paid money to the family of the complainant and the implications thereof in Jordanian tribal traditional law.

In these circumstances, I am unable to accept the recommendation of the Joint Appeals Board. Your appeal is hereby dismissed."

On 6 September 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate his appointment was without legal justification since he had been declared innocent of the accusations against him.

2. The payment to his accuser by his relatives was made without his permission. According to the local customs of the region such a payment was made merely as reconciliation pending a court judgement.

Whereas the Respondent's principal contentions are:

1. The Applicant has not provided convincing evidence that the decision was procedurally flawed or improperly motivated.

2. The termination of the Applicant's appointment was justified. The verdict of the court is not conclusive as to whether the Applicant had engaged in inappropriate behaviour on UNRWA premises. His contradictory statements concerning payment of money under tribal custom raised considerable doubt as to the actual purpose of the payment. His return to work might have an adverse affect on the Agency's operations.

3. If the Applicant did not expressly authorize the payment to the complainant, he knowingly allowed the payment to be made to secure an honourable resolution of the matter which together with the making of contradictory statements caused the Agency to lose confidence in him as a staff member.

The Tribunal, having deliberated from 5 to 28 July 2000, now pronounces the following judgement:

I. Whilst the Respondent enjoys a wide discretion as to what constitutes "the interest of the Agency" it is not a discretion that is unfettered. It is a discretion which must be exercised rationally.

If a decision to terminate the appointment of a staff member under the provisions of staff regulation 9.1 is made capriciously or arbitrarily, that decision will be neither lawful nor valid. Furthermore, the reasons for such a decision should be apparent so that they may be reviewed by a JAB or another body or by the Tribunal. Otherwise the staff member concerned would be unable to exercise fruitfully his or her rights.

The term "in the interest of the Agency" should not be construed narrowly so as to embrace only the concept of the convenience of the Agency for there are other competing interests at stake. It is in the interest of the Agency to be seen to act fairly. It would not be in the interest of the Agency to make decisions that are patently unjust or irrational and to act thereon.

II. On 16 October 1996, the Applicant was arrested and detained by the police on a charge of rape. He was released on bail on 28 October 1996. By virtue of that charge he was suspended from duty without pay. On 4 March 1997, he requested to be allowed to return to work. At that time a trial was apparently still pending. In reply to this request he was informed that his return to work could not be considered until he had provided the Administration either with a final court judgement or with a copy of the charge sheet issued against him at least. He was urged to provide the Administration with the required document not later than 20 April 1997, "otherwise the Agency may be obliged to consider the termination of your services". On 7 April 1997, the Respondent was notified that the Great Criminal Court, Jordan, declared the Applicant innocent of the accusation made against him. However, the verdict indicated that it was not the final court judgement.

On 11 May 1997, the Administration was furnished with another copy of the Great Criminal Court, Jordan, indicating it had become final.

On 8 June 1997, the FAO met with the Applicant, who was still seeking reinstatement and who was still on suspension. The Applicant was questioned about the circumstances of the case. It is clear that the FAO was unwilling to accept the acquittal of the Applicant by the Great Criminal Court at face value, because (a) he could not understand why the police had continued to hold the Applicant in custody after a time, when according to the Applicant, the accusing woman had admitted that he was not the person who had raped her, and (b) a payment called "an Atwa" had been paid by the

Applicant's family to the accusing woman's family. He took this payment to imply the Applicant's guilt. The FAO indicated that "as we are talking about a case of rape, it is difficult to see that the family of the [Applicant] would have done this, simply to keep peace between the families. It is a serious crime that touches upon the honour of the [Applicant's] family. It is difficult to believe that the family of the staff member would have gone through this procedure if the [Applicant] is innocent".

The Applicant had stated in relation to the payment of the said Atwa that neither he nor his relatives were aware that the payment would be construed as an admission or an acknowledgement of his guilt or of the possible consequences arising from this payment. The FAO recorded that he did not find this explanation to be plausible or believable.

On 11 June 1997, the Acting Director of UNRWA Operations, Jordan, recommended that the Applicant's services should be terminated in the interest of the Agency. It is clear that he likewise was unwilling to accept the acquittal by the Great Criminal Court at face value. He felt it impossible to reconcile the payment of the Atwa by the Applicant's family with the Applicant's innocence, considering such a payment tantamount to an admission of guilt on the part of the Applicant. Alternatively, he considered it tantamount to subordination of perjury. He expressed the view that it would be impossible also for cultural reasons to "reinstate the [Applicant] at the same Area Office ... because the staff there, and particularly the female ones, would neither understand nor accept his return to his previous work place." He concluded: "In addition, there is credible information that the [Applicant] does not observe due restraint vis-à-vis female visitors to the Area Office and there is no reason to expect he could do otherwise in another area." He accordingly expressed his intent to terminate the staff member in the interest of the Agency. The Tribunal notes that there is no evidence available in the papers which would suggest that the allegation that the Applicant "had not observed due restraint vis-à-vis female visitors to the Area Office" had ever been put to the Applicant nor had he been afforded any opportunity of dealing with or answering that allegation.

By letter dated 3 July 1997, the Officer-in-Charge, UNRWA Operations, Jordan, informed the Applicant that "[a]lthough the court subsequently declared you innocent of rape, this case and the

accompanying circumstances of payments made on your behalf to the female in question and her family as admitted by you has harmed the Agency's image and cast strong doubts on your personal conduct and reliability. As such, the Agency has lost confidence in you and can no longer trust you to work in its installations with this moral miasma surrounding you." His services were accordingly terminated "in the interest of the Agency" under staff regulation 9.1 and staff rule 109.1 with effect from that date.

III. The Tribunal has ruled on previous occasions that, when an allegation or suspicion of misconduct so concerns the Administration that it contemplates dispensing with the services of the Applicant, it is appropriate to invoke and to follow the Regulations and Rules pertaining to allegations of misconduct. A failure to do so and the invocation of an inappropriate procedure instead, is likely to be found to constitute an abuse of power or an abuse of procedure. (Cf. Judgement No. 877, *Abdulhadi* (1998)). That is also the meaning of the decisions in Judgements No. 926, *Al Ansari* (1999) and No. 929, *Zarra and Khalil* (1999).

IV. It is very clear to the Tribunal that the genesis of the Administration's decision to terminate the Applicant's services in the "interest of the Agency" was the allegation of rape which had been made against him. It goes without saying that such an allegation would clearly and undeniably constitute an allegation of gross misconduct which would, if established, justify summary dismissal. The Tribunal is satisfied that the Respondent was not bound by the acquittal of the Applicant on the rape charge, since presumably different onuses and burdens of proof would arise in the Jordanian domestic criminal proceedings than would arise under an investigation for misconduct under the Administration's appropriate Regulations and Rules. The Tribunal is equally satisfied that the Respondent was entitled, without proper investigation or inquiry and without affording the Applicant a fair hearing, neither to reach his own and different verdict in relation to that charge nor to terminate his services in the"interest of the Agency". In the view of the Tribunal this is probably what was done here.

The Applicant appealed to the JAB against the Respondent's decision to terminate his services. The JAB unanimously made a recommendation that the Administration's decision appealed against be reviewed with a view to reinstating the Applicant and that his absence as from 3 July 1997 be dealt with in accordance with standing UNRWA Regulations and Rules.

The JAB analyzed the judgement of the Great Criminal Court which had declared the Applicant to be innocent of the charges. It appeared willing to take the acquittal at face value, noting that since the Applicant had been declared innocent, "then there is no evidence that he harmed the Agency's image, but on the contrary his own image and reputation were harmed for no strong reason". The Tribunal understands and accepts the validity of this analysis of the situation and the common sense of the JAB's conclusion. In the view of the Tribunal it is clearly illogical to find that a person has harmed the image or reputation of the Agency merely by the fact that he was charged with an offence of which he was found innocent.

VI. The record reflects very different points of view taken by the Applicant and the Respondent in relation to the significance of the payment of the Atwa. The Applicant has stated that firstly it was made by his family without his knowledge or approval. Secondly, it was in the nature of a provisional payment and in case of his acquittal, it would be returned by the accuser's family. Thirdly, it is recognized under Jordanian tribal custom and law as not carrying with it an implication of guilt. The Applicant further maintains that since he has been acquitted the Atwa has been repaid. It appears to the Tribunal that these points have never been satisfactorily analyzed or dealt with by the Respondent. Certainly the Tribunal can find nothing contained in the record to establish that the Respondent was entitled to reject those arguments and to dismiss them as being devoid of merit. The Tribunal notes that the Acting Director of UNRWA Operations, in a memorandum dated 11 June 1997, sets out the implications in Bedouin tribal law of payment from one family to another in a case such as this. The Tribunal does not know what relevance Bedouin tribal law has to the instant case or how it differs from the tribal law or custom of the Applicant's family or his accuser's family.

VII. The Respondent duly considered the report of the JAB. In his letter of 22 April 1998, he noted that the criminal proceedings against the Applicant did not result in his conviction but further noted that the standard of proof in a criminal case is higher than that which bound the Administration in its consideration of "whether your continued employment was in the best interest of the Agency". The Tribunal is somewhat troubled by this statement. It certainly appears to suggest that the acquittal of the Applicant on the rape charge did not in any way bind him when considering whether the Applicant's continuing employment was in the best interest of the Agency. This certainly suggests that he believed that he did not have to approach that consideration on the basis that the Applicant was not guilty. The Tribunal wonders whether, perhaps, the Respondent decided to consider his continuing employment on the basis that he was probably guilty but that this had not been proven?

The Respondent went on to say that he could not accept the JAB's findings that the whole affair had not harmed the Agency's good image in Jordan. This seems tantamount to saying that when an allegation has falsely been made against an innocent man and that false allegation has harmed the Agency's good image, it can nonetheless justify termination of the services of the innocent person. In the opinion of the Tribunal such a concept would be a defiance of legal principle, justice and common sense.

The Respondent then went on to express concern that the JAB appears "to have overlooked the fact that the Administration did consider the acquittal in reaching its decision and ignored the fact that your family paid money to the family of the complainant and the implications thereof in Jordanian tribal traditional law". In the view of the Tribunal this statement is nothing less than mischievous and disingenuous. If the Respondent by his decision to terminate the Applicant's services had accepted the Applicant's acquittal by the Great Criminal Court as a verdict of not guilty and if he had ignored the fact of the payment of the Atwa, as is implied by the Respondent, the Tribunal is then at a loss to know why the decision was made to terminate the Applicant's services in the interest of the Agency. It would seem that, if the acquittal was treated as such and if the payment of the Atwa was ignored, the services of the Applicant were terminated on the unsubstantiated allegation that he had not observed due restraint vis-à-vis female visitors to the Area Office, which had never been put to the Applicant or alternatively on the assumption that if he were to be reinstated

staff members would neither understand nor accept his return. The Tribunal is of the view that if the decision to terminate his services was made on either of those grounds or a combination of them it was clearly erroneous, unjust and could not be allowed to stand.

VIII. The Tribunal is satisfied that notwithstanding wording used, the true reason the Respondent terminated the Applicant's services "in the interest of the Agency" was because the Respondent did not accept the acquittal of the Great Criminal Court at face value and because it considered the Applicant guilty or someone who should be perceived as guilty notwithstanding his acquittal. If that was the situation, the Respondent should have followed the Regulations and Rules governing misconduct so that appropriate findings could have been made. The Tribunal is not satisfied that a loss of confidence in the Applicant is sufficient to justify the termination of his services "in the interest of the Agency" unless the facts giving rise to such a loss of confidence are identified. It seems clear to the Tribunal that the decision made here was made on the basis of unwarranted findings, and improperly drawn inferences. Under the circumstances the decision made should not be allowed to stand.

IX. For the foregoing reasons, the Tribunal:

1. Finds in favour of the Applicant and orders the rescission of the decision of the Respondent, dated 3 July 1997, to terminate the Applicant's appointment in the interest of the Agency;

2. Orders that the Applicant be reinstated in a position with the grade and the step that he held when he was separated, with full payment of salary and emoluments from the date of his separation from service;

3. Should the Respondent, within 30 days of the notification of this judgement decide, in the interest of the Agency, that the Applicant shall be compensated without further

action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary .

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

Kevin HAUGH
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/952
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 952

Case No. 1058: HAMAD

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas at the request of Imad Hussein Hamad, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 December 1998, the Applicant filed an application containing pleas which read as follows:

"***SECTION II PLEAS***

Applicant prays the esteemed Tribunal to ...:

a. [Rescind the] decision of the Commissioner-General, and [order] his reinstatement to duty.

b. [Consider the] period of cessation [as] special leave with full pay.

c. [Order] compensation for injury sustained, including libel and slander exercised by [the] Respondent.

d. Should [the] Respondent refrain from reinstating [the] Applicant, ... order payment of salaries plus interest until the date of enforcement of judgement.

e. [Order] payment of secretarial and counseling fees."

Whereas the Respondent filed his answer on 8 August 1999;

Whereas the Applicant filed written observations on 22 September 1999;

Whereas the Applicant submitted further comments on 3 May 2000;

Whereas, on 26 June 2000, the Respondent submitted written comments on the Applicant's written observations;

Whereas, on 6 July 2000, the Applicant filed an additional document and on 24 July 2000 the Respondent commented thereon;

Whereas, on 15 July 2000, the Applicant submitted written comments on the Respondent' s submission of 26 June 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 11 September 1995, as an Area staff member on a three-year fixed-term appointment, in the capacity of Teacher (Arabic, Religion), Joura School, Damascus Area, Syrian Arab Republic (SAR). His appointment was subject to an initial period of probationary service of 12 months duration. The Applicant's probationary appointment was terminated effective 10 April 1997.

On 16 October and 20 November 1995, a School Supervisor from the Department of Education, UNRWA, SAR, after reviewing the Applicant's performance, gave him a rating of "Average" (3 in a scale of 1 to 7, where 7 is highest) in his report. In two further reports dated 12 February and 28 March 1996, the Applicant was again rated "Average"; however, the School Supervisor had added remarks to the effect that the Applicant was conscientious, cooperative, accepted instructions and acted thereupon.

On 10 May 1996, the Area Education Officer (AEDO) sent a letter of reprimand to the Applicant stating that based on the School Supervisor's reports he noted that the Applicant's' competence, efficiency, and educational performance were weak, that his educational results were low and that he was not responsive to instructions aimed at developing his abilities. On 25 September 1996, the Chief, Field Education Programme, SAR, sent another letter of reprimand to the Applicant for poor performance.

On 9 October 1996, the Applicant's first periodic report was completed by his supervisors. His overall rating was "a staff member who maintains only a minimum standard of efficiency", and at the end the AEDO had added a comment to the effect that the Applicant was an "Unsatisfactory teacher". Deferral of the Applicant's annual salary increment for six months was recommended. On 23 October 1996, the Field Personnel Officer, SAR, notified the Applicant that in view of his periodic report and the comments contained therein, it had been decided to defer his annual salary increment (due 1 October 1996) for a period of six months. A new periodic report would be prepared on 1 April 1997. On 6 November 1996, the Chief, Field Education Programme sent a memorandum to the Applicant following a class visit, urging him to exert efforts to step up his technical and professional competencies.

On 3 March 1997, a different School Supervisor rated the Applicant's performance "Average", while remarking that he was "... a responsive teacher who has language competencies that he uses well in class situations." However, the AEDO had added on the report that "the standard of the teacher is weak and he does not deserve the evaluation given to him by the School Supervisor."

The Applicant's second periodic report was completed on 20 March 1997. His overall rating was again "a staff member who maintains only a minimum standard of efficiency" and the report once more included the comment "Unsatisfactory teacher". Another deferral of his annual increment for six months was recommended. On 6 April 1997, the School Supervisor wrote a memorandum to the AEDO recommending deferral of the Applicant's annual salary increment "based on the shortcomings [he] witnessed along with everybody ..."

On 7 April 1997, the AEDO, in a memorandum to the Chief, Field Education Programme recommended termination of the Applicant's appointment. On 8 April 1997, the Director of UNRWA Affairs, SAR, informed the Applicant of the decision to terminate his appointment effective 9 April 1997, under paragraph 10 of his Category "X" letter of appointment, which specified that a probationary appointment may be terminated by the Agency at its sole discretion and without notice at any time during the probationary period.

Subsequently, the Applicant wrote a memorandum to the Director of UNRWA Affairs which was received 27 April 1997, in which the Applicant requested him to review the decision to terminate his appointment. On 11 May 1997, the Officer-in-Charge, UNRWA Affairs, responded to the Applicant and informed him that after reviewing the decision, he saw no reason to change it.

On 25 May 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 25 March 1998. Its evaluation, judgement, and recommendation read, in part, as follows:

> "**III. EVALUATION AND JUDGEMENT**
>
> 17. ....
>
> (a) The Board noted that all school supervisor's reports rated the Appellant average, conscientious, cooperative, tends to improve his professional skills and not weak, also the last school supervisor's report which [was] dated 3/3/97 rated the Appellant average +, receptive, responsive teacher possesses linguistic competencies which he properly uses in class situations, which is a sign that the Appellant is showing improvement.
>
> (b) The Board noted the school supervisor's remarks about the position of the teacher dated 6/4/97, which stated 'I paid him two class visits when he showed some performance progress in carrying out class period'".
>
> ...

(d) The Appellant should be treated as a confirmed staff member as the probation period should not in any circumstances exceed eighteen months (PD/A4/Part VII/9.1) while he spent around 19 months (11 September 1995 - 9 April 1997).

(e) In this context, the Board is of the opinion that the Administration could have taken into consideration his improvement before terminating him.

IV. RECOMMENDATION

18. In view of the foregoing ..., the Board by majority vote makes its recommendation that the Administration's decision be reviewed."

One JAB member filed a dissenting opinion, which read, *inter alia*, as follows:

"DISSENTING OPINION OF BOARD MEMBER ...

- I disagree with the Board in that the Appellant received several letters of reprimands and did not object to them.

- The Appellant had two unsatisfactory periodic reports.

- I am of the opinion that the improvement which the Appellant showed was not within the required standard.

- In view of the forgoing, I recommend that the appeal be dismissed."

On 29 April 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him, in part, as follows:

"...

I have carefully considered the report and the majority recommendation. I am inclined to accept the recommendation that the administrative decision be reviewed, and I have conducted such review. Having done so, I am of the view that there was a reasonable basis for determining that your performance as a teacher was unsatisfactory and for terminating your employment with the Agency. I do not find the

school supervisors' reports persuasive, and note that the numerical ratings contained therein are not impressive. Moreover, both periodic reviews rate your performance as unsatisfactory. Consequently, I am not prepared to reinstate you. I believe, however, that you are entitled to 30 days salary in lieu of notice of termination, and by copy of this letter I so instruct the Administration.

..."

On 30 December 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's services was based on inconsistencies, mistake of fact and error of law.

2. The decision was not based on poor performance or lack of technical skills, but motivated by prejudice.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the services of the Applicant was based on his continued unsatisfactory performance and was made in conformity with the terms of his appointment and the relevant regulations and rules.

2. It was within the discretion of the Agency to terminate the services of the Applicant for unsatisfactory performance. The Agency did not abuse its discretion and the termination of the Applicant was not based upon any prejudice or bad faith.

The Tribunal, having deliberated from 12 to 28 July 2000, now pronounces the following judgement:

I. The Applicant joined UNRWA effective 11 September 1995. His probationary appointment was terminated effective 10 April 1997, exceeding the maximum period of eighteen months, stipulated in personnel directive A/4/Part VII/Rev.7, paragraph 9.1 and specified in his letter of appointment, by seventeen days.

II. The Tribunal, first, must determine the legal consequences of the fact that the Applicant had exceeded his probationary period, as the Agency did not reserve its rights, and the deadline passed without any action on the part of the Agency. Is this enough to make him a confirmed staff member?

III. Should the Tribunal find that this was not the case, it must determine whether the Applicant's separation from service under paragraph 10 of his letter of appointment after the stipulated deadline was within the discretion of the Agency and not in violation of the Agency's Regulations and Rules.

IV. With regard to the first issue, the Tribunal is satisfied that the mere fact that the Applicant's probationary service exceeded the maximum period by close to a month does not in and of itself mean that his appointment was confirmed. Thus, the Applicant was still on probation at the time he was separated from service. The Tribunal gives the following reasons:

(i) In the first place, if it had been the intention of UNRWA that probationary appointments would be confirmed without any action on the part of the Agency upon the first day following the maximum probation period of eighteen months, this would have been set out in the Regulations and Rules. This is not the case. Even though the Personnel Directive states that "the total period of continuous probation shall not in any case exceed eighteen months", it does not say that if that period is exceeded, a staff member is automatically confirmed; and,

(ii) In the second place, and perhaps more importantly, paragraph 11 of the same Personnel Directive establishes that "in all circumstances satisfactory completion of

probationary service is a condition of confirmation of appointment". This then is the real and substantial condition for confirmation whereas the setting of a maximum probationary period seems rather in the nature of an instruction to the Administration so that staff on probation would not remain so for unduly long periods, awaiting a final decision on their employment status.

V. The question then is whether or not the Applicant had completed his probationary period to the satisfaction of the Agency.

VI. The Agency has a wide discretion to determine whether the performance of a staff member is satisfactory, and, if it finds that this is not the case, to terminate the staff member's services for that reason. However, as the Tribunal has consistently held, such discretion is limited. The Agency should act in good faith, follow due process, and ensure that its decisions do not suffer from arbitrariness or improper motivation.

VII. At the same time, the Tribunal has held that the burden of proving improper motivation or prejudice lies with the party who makes the allegations. In the present case, the Tribunal finds that the Applicant has not brought convincing proof that the decision to terminate his services for unsatisfactory performance was biased or improperly motivated. On the contrary, there is ample evidence of the Applicant's unsatisfactory performance. Even though the first School Supervisor gave him an overall rating of "Average" and included in his report encouraging remarks, his successor recommended to the AEDO that the Applicant's annual increment be deferred based on his shortcomings. The AEDO noted that the standard of the Applicant was "weak" and that he did not deserve the evaluation given to him by the School Supervisor. The Applicant's periodic reports rated him as a staff member "who maintains only a minimum standard of efficiency", included the comment that he was an "unsatisfactory teacher", and recommended that his annual increment be deferred. In addition, he was given

two written reprimands by the Chief, Field Education Programme, SAR, advising him to "step up his technical and professional competencies". Finally, the Field Personnel Officer, SAR, wrote to the Applicant on 23 October 1996, listing his numerous shortcomings, and advised him that his annual increment would be deferred.

VIII. On 8 April 1997, the Director of UNRWA Affairs, SAR, informed the Applicant that his second periodic report had indicated that he "was not industrious", that he tended "to fall behind" in his work and that his performance was "uneven". Accordingly, he decided to terminate the Applicant's services effective 9 April 1997, under paragraph 10 of his letter of appointment.

IX. The Tribunal is satisfied that in the exercise of his discretion to terminate the Applicant's employment, the Respondent was not guided by any improper motive. The decision was not arbitrary and did not violate due process of law. In the exercise of that same discretion, the Respondent had a number of reports before him: those of the School Supervisor, which were slightly more favourable to the Applicant and those of the AEDO and the Chief, Field Education Program, SAR, which were less so. The Tribunal can find no improper motivation in the decision by the Director of UNRWA Affairs, SAR, to give more weight to the reports from the United Nations staff members, which, doubtless, were considered by him as better reflecting the real qualities – or if preferred, the real defects - of the Teacher. The Tribunal is satisfied that the Director used his discretion within the permitted limits.

X. For the foregoing reasons, the Tribunal rejects the application its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/953
28 July 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 953

Case No. 1062: YA'COUB

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha A. Echols;

Whereas at the request of Ali Mohammed Ya'coub, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 19 January 1999, the Applicant filed an application containing pleas which read as follows:

"**SECTION II PLEAS**

Applicant prays the esteemed Tribunal to:

a. [Reimburse] medical treatment expenses plus due interest.

b. [Pay] interest on separation benefits between date of payment and the date of settlement.

c. [Pay] counselling and secretarial expenses estimated at US $ 400."

Whereas the Respondent filed his answer on 27 October 1999;

Whereas on 6 July 2000, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA as an Area staff member, with the title of Trade Instructor, Radio and TV Mechanic, at the Vocational Training Center, Damascus, Syrian Arab Republic (SAR), on a temporary indefinite appointment, on 15 June 1985. He separated from service on 1 July 1996, for health reasons.

On 22 April 1995, the Applicant was diagnosed with cancer of the vocal cords. On 4 May 1995, after unsuccessful surgery in Damascus, SAR, while he was still on sick leave, he requested the Field Personnel Officer (FPO), SAR, for permission to travel to Jordan for urgent medical treatment. On the same date, the FPO approved the Applicant's request. In a letter dated 9 May 1995, the Field Administration Officer (FAO), SAR, informed the Applicant that the period of leave would be debited against his sick-leave accruals and that he had to produce upon return a medical certificate duly certified by the Chief, Health Programme, Jordan, indicating "the nature of your disease and the period of treatment".

In early June, the Applicant, on the advice of his doctors in Jordan, travelled to the West Bank (Palestine) for radiotherapy (cobalt treatment, which was not available in Jordan) at the Haifa Italian Hospital, without informing his office in advance. He received 34 radiotherapy sessions, between 6 June and 21 July 1995. On 12 September 1995, the Applicant wrote to the Chief, Field Health Programme, SAR, attaching his medical report and requesting that his travel abroad be considered as sick leave and that he be compensated for "all the medical expenses during my travel for treatment".

On 24 September 1995, the Officer-in-Charge, Personnel Division, SAR, replied to the Applicant's letter, on behalf of the Chief, Field Health Programme, SAR. He approved the

Applicant's absence as sick leave, but regretted that the request for reimbursement could not be approved because the "[Applicant] had failed to follow the normal procedures adopted by the Agency". On 26 September 1995, the Applicant replied to the FAO, expressing surprise that his medical expenses would not be paid "because [he] did not abide by UNRWA rules which [he was] not aware of", and requesting reconsideration of the decision. In his reply of 18 October 1995, the FPO advised the Applicant that he had nothing to add to what had been communicated in the letter of 24 September 1995.

On 13 November 1995, the Applicant wrote to the Director, UNRWA Affairs, SAR, requesting his assistance in the matter. On 27 November 1995, the Officer-in-Charge, UNWRA Affairs, SAR, informed the Applicant that he could not accede to his request.

On 14 January 1996, the Applicant asked the Principal, Damascus Training Center, to make arrangements to refer his case to a medical board, because he felt unable to continue his work in vocational training. On 11 February 1996, the Principal requested the Chief, Field Health Programme, SAR, to convene a medical board. On 29 February1996, the Medical Board convened to examine the Applicant concluded that he was "unfit for further service with the Agency". The Chief, Field Health Programme, SAR, concurred with this conclusion on 3 March 1996. On 13 March 1996, the FPO advised the Applicant of the conclusion of the Medical Board, and informed him that he would be placed on sick leave status until he had exhausted all his sick-leave accruals, i.e. until 1 July 1996, on which date his services would be terminated for health reasons under the provisions of Area staff rule 109.7.

On 19 March 1996, the Applicant wrote to the Director, UNWRA Affairs, SAR, asking him to pay his separation benefits using the exchange rate of SYP (Syrian pounds) 26.60 the exchange rate in March 1996, and not the less favourable exchange rate of July 1996. The Applicant stated that in return he was willing to release the Agency from any obligations after the date of the decision to terminate him for health reasons (13 March 1996). The FPO advised the Applicant on 31 March 1996 that his request could not be acceded to. On 12 June 1997, the Applicant wrote a letter to the Director, UNRWA Affairs, SAR, copied to the Commissioner-General, requesting review of the decisions not to reimburse his medical expenses and not to use the more favourable exchange rate.

On 25 July 1997, the Applicant lodged an appeal with the JAB against the refusal to (a) reimburse his medical expenses with interest, (b) pay his separation benefits at SYP.26.60 to the US dollar plus interest, and (c) pay secretarial and counselling fees.

On 7 August 1997, the Officer-in-Charge, UNRWA Affairs, SAR, advised the Applicant that having reviewed the case, he could not accede to his request for reimbursement, because the Applicant had not followed the normal procedures adopted by the Agency. In particular, he was "authorized to **travel** outside Syria for medical treatment, but [he] neither applied for nor [was he] authorized to have [his] expenses for medical treatment outside Syria reimbursed by the Agency". He also denied the request for the use of the more favourable exchange rate.

On 7 October 1997, the FAO advised the Applicant that the Commissioner-General had decided that his separation benefits be paid "at the exchange rate applicable on 30 April 1996 (i.e. SYP. 26.60 for one US dollar) provided that the Agency should receive credit for the salaries received by [him] after that date".

On 15 October 1997, the Secretary of the JAB asked the Applicant whether he wished to pursue his appeal, in light of the decision of the Commissioner-General. On 23 October 1997, the Applicant replied in the affirmative, as the Commissioner-General had only acceded to one of his pleas.

The JAB submitted its report on 25 March 1998. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION & JUDGEMENT**

30. In its deliberations, the Board examined all documents cited before it, including the Appellant's personal file and came out with the following:

(a) The Board dwelt on the preliminary issue of receivability and decided to declare the appeal receivable due to the serious illness that the Appellant has.

(b) The Board noted that the Appellant's claim for reimbursement of medical expenses plus interest was not well founded, for the Appellant failed to show a written medical report from the first doctor recommending that he needs to be treated in the Italian Hospital in Haifa.

(c) The Board also noted that there are no provisions in the Area Staff Rules that govern payment of interest and secretarial and counseling fees.

(d) The Board noted that the Appellant's claim for interest on the money which was not paid to him in due time is well founded, because since the Administration kept his money for 18 months and the interest rate was still in effect, then it is only logical that the Appellant receives his money plus the interest.

IV. RECOMMENDATION

31. In view of the foregoing …, the Board unanimously makes its recommendation to uphold the Administration's decision, concerning the reimbursement of the Appellant's medical treatment expenses and interest, and the request for payment of secretarial and counseling fees.

As for the claim for interest on the separation benefits between the date of payment and the date of settlement, the Board unanimously makes its recommendation that the Administration's decision be reviewed."

On 22 April 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"…

The Board stated that it considered the appeal receivable despite the preliminary objections raised by the Administration 'due to the serious illness that the Appellant has'. In its findings, the Board makes no distinction between the issue of competence and the issue of the receivability of the claim; two separate issues in respect of which the Administration has made separate and distinct submissions.

The issue of competence was raised by the Administration in respect of your claim for secretarial and counseling fees and your claim for payment of interest accrued in connection with your separation benefits. Staff rule 111.1 (5) provides that the Board shall determine its own competence in cases of doubt. However, it is not possible to discern from the Board's recommendations whether the issue of competence was considered. I have, therefore, not been advised on this aspect of the appeal and I have therefore requested clarification from the Board on this point.

The issue of receivability was raised in connection with your claim for reimbursement of your medical expenses. On this issue, the Board stated that it had found

the appeal receivable 'due to the serious illness that the Appellant has.' However, a 'serious illness' of itself does not constitute exceptional circumstances upon which a decision to waive time limits can be based. While it is not disputed that you are seriously ill, specific reasons why it took you two years to appeal the administrative decision not to reimburse you for your medical expenses (during which period you requested reviews of other administrative decisions) have not been submitted to or considered by the Board. Exceptional circumstances cannot be assumed or declared to exist without full consideration of the reasons, if any, adduced by the staff member as to why he or she did not meet the time limits. There is no evidence of any such consideration in this case. On these grounds, I reject this part of the Board's recommendation.

In substance, the Board decided that your claim for reimbursement of medical expenses plus interest was not well-founded because you had failed to present a proper medical report. The Board further advised that the Area Staff Rules do not require the payment of secretarial and counseling fees. Without prejudice to the preliminary issues discussed above, I agree with the Board's conclusions on this issue and accordingly dismiss this part of the appeal.

Lastly, the Board decided that your claim for payment of accrued interest between the date of payment and the date of the separation entitlements was well-founded 'because since the Administration kept (your) money for 18 months and the interest rate was still in effect, then it is only logical that the Appellant receives his money plus due interest.' There is however no provision in the Staff Rules, nor is there an established practice within the Agency, on which to base payment of accrued interest in connection with emoluments paid by the Agency. Therefore, I reject the Board's conclusions and the appeal on this issue.

..."

On 19 January 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. He followed the prescribed procedures when he applied for reimbursement of medical treatment expenses. The medical bills submitted by him for reimbursement were reasonable and necessary under the circumstances.

2. The Applicant is entitled to interest on his separation benefits which were due on 1 July 1996, but not actually paid to him until October 1997.

Whereas the Respondent's principal contentions are:

1. The Applicant's claim for compensation for reimbursement of medical expenses is not receivable by the Tribunal as he failed to submit his written appeal to the JAB within thirty days from the date of the final response to his request for review of the decision not to make such reimbursement. He therefore failed to comply with paragraph 1 of Area staff rule 111.3 (3).

2. The Applicant's claim for reimbursement of medical expenses plus interest is unjustified because he failed to comply with Personnel Directive A/15 dated 22 January 1993 which conditioned reimbursement on prior authorization of the treatment. Furthermore the Applicant did not substantiate the need for emergency medical care or inform the Agency promptly after such treatment.

3. The Applicant's claim for payment of accrued interest on separation benefits is not receivable, since he never made a request for interest; consequently no administrative decision existed. Hence this aspect of his appeal "was not directed at a specific administrative decision, as required by Area staff regulation 11.1".

The Tribunal, having deliberated from 17 to 28 July 2000, now pronounces the following judgement:

I. The Tribunal will first recall the issues before it in this case.

(i) Did the Applicant delay too long in appealing to the JAB with regard to the claim for medical expenses?

(ii) If not, does he have a good claim for the medical expenses incurred by him?

(iii) Can the Applicant bring a claim for interest on his separation benefits?

(iv) Is the Applicant entitled to costs?

II. On the first issue the Tribunal notes the following relevant facts:

(a) On 12 September 1995, the Applicant requested reimbursement for all medical expenses incurred.

(b) On 24 September 1995, the Officer-in-Charge, Personnel Division, refused the Applicant's request "as [the Applicant] had failed to follow the normal procedures adopted by the Agency".

(c) On 13 November 1995, the Applicant wrote to the Director, UNRWA Affairs, in effect requesting review of the decision.

(d) On 27 November 1995, the Officer-in-Charge, UNRWA Affairs, replied rejecting his claim for medical expenses.

(e) On 12 June 1997, the Applicant *again* wrote to the Director, UNRWA Affairs, requesting review of the administrative decision.

(f) On 25 July 1997, the Applicant appealed to the JAB making several claims including the claim for reimbursement of medical expenses.

(g) On 7 August 1997, the Officer-in-Charge, UNRWA Affairs, replied rejecting the claim made on 12 June 1997.

III. The facts show clearly that the Applicant's claim was rejected after administrative review on 27 November 1995. The Applicant appealed to the JAB on 25 July 1997, 20 months later. His second request for review on 12 June 1997 cannot be regarded as the proper request for review because the Applicant appealed to the JAB on 25 July 1997 before receiving a reply to his 12 June letter. He must have believed that he had already exhausted administrative review. In any event if the 12 June letter were regarded as the proper request for administrative review it would not have been timely, in view of the first decision rejecting his claim made on 27 November 1995. Even if the 12 June letter is regarded as the proper request for administrative review the JAB would have rejected the appeal on the ground that the Applicant had not exhausted administrative review.

IV. However, the proper request for administrative review was, in the opinion of the Tribunal, made on 13 November 1995. The decision rejecting the claim on review was given on 27 November 1995.

V. In whichever way the facts are interpreted the question is whether the JAB correctly regarded the appeal as receivable under the exception for exceptional circumstances. Either the Applicant took about 20 months to apply for administrative review, which was far longer than allowed (30 days), or he appealed to the JAB 20 months or so after the decision on administrative review, which was also much longer than allowed (30 days).

The 20-month period could not, the Tribunal finds, be justified in either case on the basis of exceptional circumstances, which the Applicant claims existed because of his illness. Applicants are expected to act with due diligence. The Applicant's illness may be good cause for exceeding the time limits but does not justify exceeding them by 20 months. There is no evidence that, for example, the Applicant was unconscious or completely incapacitated for that length of time.

VI. The purpose of time-limits in regard to internal remedies is to preserve the stability of the position in law of the parties (see ILOAT Judgement No. 602, *in re Decroix* (1984)). Even if extensions for equitable considerations are possible, this happens very rarely and must be carefully justified. Otherwise the purpose of time-limits would be totally defeated. The Tribunal is of the view that the Applicant, for example, could have entrusted his case to a lawyer or counsellor who could have acted with the minimum delay. In short, a delay of 20 months is not justifiable.

The Tribunal concludes on the first issue that the Applicant had not exhausted his internal remedies in a timely manner. Therefore, the JAB should not have received the appeal.

VII. In the above circumstances the second issue becomes moot.

VIII. On the third issue to which the matter of the time limit is not relevant, the Tribunal agrees with the Respondent that there was no administrative decision to challenge. It is a recognized principle of international administrative law that in general in order that a tribunal may exercise jurisdiction there must be a *final decision* affecting the staff member taken by the Administration (cf. Judgements No. 221, *Berubé* (1977); No. 237, *Powell* (1979); No. 304, *Moser* (1983) and No. 329, *Longerich* (1984)). It is understandable that the Administration must be given the opportunity to

consider and take a decision on a claim. In this case the Applicant has not submitted at all his claim for interest to the Administration. The Tribunal, therefore, cannot assume jurisdiction on this issue.

IX. On the fourth issue of costs, the Tribunal notes that the Applicant has not won any of his claims. Therefore, the question of awarding costs, which it is the Tribunal's practice hitherto to do only in exceptional circumstances, does not arise. The claim for costs is rejected.

X. For the above reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Marsha A. ECHOLS
Member

Geneva, 28 July 2000

Maritza STRUYVENBERG
Executive Secretary